
**GLOBALIZATION, TREATY POWERS, AND THE LIMITS OF
THE INTELLECTUAL PROPERTY CLAUSE**

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ABSTRACT

Recent years have seen the development of three trends that will soon require a fundamental rethinking of certain aspects of the federal government's treaty powers. The first is the explosive increase in the value of international transactions in the wake of GATT and NAFTA. The second is the U.S. Supreme Court's imposition of limitations upon the power of Congress to protect intellectual property. The third is the Court's reinvigoration (or even resurrection) of the Enumerated Powers Doctrine in a number of expansively-worded opinions promulgated by narrow majorities.

Congress is under continually-increasing pressure to provide greater protections for intellectual property rightsholders. Its power to grant such protections, however, is more limited now than at any time in the last half-century due to recent judicial restrictions upon the scopes of the Intellectual Property and Commerce Clauses. Congress is likely to respond to these new limitations by passing intellectual property legislation pursuant to the federal government's treaty powers.

As early as 1879, the Supreme Court raised the question whether Congress could pass legislation to effectuate a treaty when it could not do so under the Intellectual Property or Commerce Clauses. In 1920, the Court appeared to answer that question in the affirmative, though in 1956, the Court made clear that no treaty could empower Congress to overcome specific Constitutional prohibitions like those contained in the Sixth Amendment.

Thus, until recently, it appeared that when Congress legislated to implement a treaty, the Enumerated Powers Doctrine was inverted: Congress could legislate on any subject not specifically denied to it. Given the number of international intellectual

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property agreements to which the U.S. is a party, this reversal suggested an inexhaustible source of federal power to legislate in that area.

A recent series of Supreme Court decisions has called this state of affairs into considerable doubt, however, with the result that courts will soon have to resolve the serious conflicts that have developed among the doctrines governing federal power as it relates to intellectual property, international commerce, and treaties. This article seeks to define the contours of those conflicts, and describe the means by which the courts may ultimately resolve them.

I. INTRODUCTION

This article seeks to answer a question that the Supreme Court first posed some twelve decades ago in the *Trade-Mark Cases*,¹ in which the Court addressed a Constitutional challenge to Congress's first attempt to enact a federal trademark law. The basis of the challenge was that the legislation could not properly be premised on Congress's power under the Intellectual Property Clause.²

The Court agreed with the challengers, ruling that "[w]hile such legislation may be a judicious aid to the common law on the subject of trademarks, . . . we are unable to see any such power in the Constitutional provision concerning authors and inventors, and their writings and discoveries."³ The Court also ruled that the legislation could not be sustained under the Commerce Clause because it purported to regulate commerce that was wholly intrastate.⁴

One of the most intriguing aspects of the opinion, however, was the question that it carefully left open: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."⁵ In all the years since the *Trade-Mark Cases*, the question whether Congress can legislate pursuant to treaty what it cannot legislate pursuant to the Intellectual Property Clause has remained unanswered.

¹ 100 U.S. 82 (1879).

² *Id.* at 93-94.

³ *Id.* at 94.

⁴ *Id.* at 99. Subsequent interpretation of the Commerce Clause has, of course, largely removed this limitation. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1156.

⁵ *Trade-Mark Cases*, 100 U.S. at 99.

For a very long time, there was no real need to answer it. Only recently has the Supreme Court placed sharp limits on the Intellectual Property Clause. Those limits might well not have been any significant impediment to Congress but for the Court's dramatic curtailment of Congress's power under the Commerce Clause, which began at nearly the same time.

Until 1991, Congress's power under the Commerce Clause was all but unlimited. Since then, a series of Supreme Court cases, usually decided by 5-4 margins, has reintroduced federalism as a factor governing the boundaries of the Commerce Clause. Federalism cases in other areas, such as federal "commandeering" of state officials and state sovereign immunity under the Eleventh Amendment, have given rise to a firm impression that a majority of the current Justices of the U.S. Supreme Court are determined to impose limits on the potential growth of the scope of Congress's legislative power.

These developments have occurred at a time when Congress has been under considerable pressure to expand intellectual property protection beyond the currently-construed limits of the Intellectual Property Clause. Part of this pressure has come from abroad, in the form of a push for the harmonization of U.S. intellectual property law with the law of other powers, notably the European Union.

The international character of the problem suggests a possible solution: Congress may soon be tempted to revisit the unanswered question of the *Trade-Mark Cases* by passing intellectual property legislation pursuant to one or more treaties. In doing so, it would rely on two U.S. Supreme Court decisions under which, in essence, the Enumerated Powers Doctrine is turned on its head.

In its usual form, the Doctrine provides that the federal government has no power other than those expressly delegated to it by the Constitution; all other powers are retained by the states or by individuals. The Doctrine is part and parcel of the concept of federalism, under which power is divided between federal and state spheres of operation and authority.

Where Congress legislates to implement a treaty, however, those two Supreme Court cases stand for the proposition that Congress may pass any law that does not directly contradict an express prohibition in the language of the Constitution itself. Under those cases, the Tenth Amendment, which is the clearest embodiment of the Enumerated Powers Doctrine, is not treated as an express prohibition, though the Sixth Amendment is.

Because the more recent of the two was decided in 1957, and because the Enumerated Powers Doctrine was in decline at that point and for most of the following three decades, there was little reason until recently to believe that Congress would suffer any meaningful federalism-based re-

striction on its power to implement treaties via legislation. The sharp resurgence of federalism-based limitations brought about by recent Supreme Court cases, however, warrants revisiting this area.

That resurgence has been motivated by an originalist conception of the federal structure of the Constitution. The Framers' paramount goal was to prevent the centralization and concentration of power, in part due to what they had experienced of the European despotisms of their day. To achieve this goal, they sought to divide power among offices whose holders, due to their natural human weaknesses, would jealously guard their own power and work to thwart the increase of the power of other offices.

In its most celebrated form, this strategy can be seen in the division of the power of the federal government among its legislative, executive, and judicial branches. This division could accurately be described as "horizontal" separation of powers. The same strategy is replicated in the "vertical" separation of powers between the federal government and the states. The latter separation has been the subject of numerous, recent, and emphatic reaffirmations by the Supreme Court. In essence, the Court has declared that it will seek to protect this vertical separation by limiting Congress's power to intrude upon the state sphere or, equally importantly, to increase the power of the federal government by legislation while the states' power remains unchanged.

This emphasis on judicial rather than political policing of federal-state boundaries is the product of a fundamental change in the Constitutional system that came about in the early part of the last century. Before the enactment of the Seventeenth Amendment, the Senate was composed of members selected by state legislatures rather than by the citizens of the states. The Senators were thus strongly influenced by state officers who had a direct, selfish interest in the preservation of state prerogatives vis-a-vis the federal government. The Seventeenth Amendment, which required direct election of Senators, fundamentally changed the incentives of the members of the Senate. Freed from accountability to the states *as states*, they lost the incentive to guard jealously against federal intrusions, at least where those intrusions did not offend their constituents.

This had the effect of frustrating the Framers' intent with respect to separation of powers. It is doubtful in the extreme that they ever intended federalism to be preserved via the judiciary; in fact, there is good reason to believe that they would have thought it impossible for the judiciary to succeed in preserving it. Nonetheless, in the post-Seventeenth-Amendment environment, if federalism is to survive, it is likely that only the judiciary can ensure its survival.

As currently composed, the Supreme Court appears determined to achieve this. Thus, it is unlikely that the Court will countenance the circumvention of limitations on Congress's legislative power, even in an area

like intellectual property, in which the states have very limited authority. As the Court has implied, the growth of federal authority in absolute terms means the diminution of state authority in relative terms. Accordingly, the Court will likely prevent treaty-based Congressional circumvention of the limitations of the Intellectual Property and Commerce Clauses, thereby finally answering the question it left open in the *Trade-Mark Cases*.

II. THE LIMITATIONS OF THE INTELLECTUAL PROPERTY CLAUSE

The Framers of the Constitution strongly believed that uniform, nationwide intellectual property protection was essential for the generation and dissemination of new writings and inventions.⁶ Accordingly, the Intellectual Property Clause of the U.S. Constitution grants Congress the power “[t]o promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷

However, in addition to the federal public policy of protecting innovation and originality by granting limited monopoly rights via patent and copyright, there is a parallel policy of ensuring that no monopoly rights are granted with respect to public-domain information.⁸ The public domain consists of all sources of information and expressions over which no person has exclusive rights, either because they never qualified for intellectual property protection, or because they lost that protection in some way.⁹

More than thirty years ago, the Supreme Court made clear the Constitutional stature of free access to public-domain information in *Graham v. John Deere Co.*:¹⁰

[The Intellectual Property Clause] is both a grant of power and a limitation The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the

⁶ Richard B. Graves III, *Private Rights, Public Uses, And The Future Of The Copyright Clause*, 80 NEB. L. REV. 64, 66 (2001).

⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸ Graves, *supra* note 6, at 66; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

⁹ Graves, *supra* note 6, at 75; Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 545 (1999).

¹⁰ 383 U.S. 1, 5-6 (1966).

public domain, or to restrict free access to materials already available.¹¹

Noting that “[i]t was a monopoly on tea that sparked the Revolution,” the Court reasoned that this view of the Intellectual Property Clause was consistent with Americans’ “instinctive aversion to monopolies.”¹² At the time of the framing and ratification of the Constitution, the abuses of the Statute of Anne and the Crown monopolies were quite recent and present in the minds of Americans, and it appears that the purpose for granting Congress a separate and distinct intellectual property power (in addition to the more general commerce power) was to clearly express the limitations of the former.¹³

In 1989, the U.S. Supreme Court delivered a unanimous ruling that clearly defined some of those limitations in the context of public-domain information that falls within the scope of federal patent policy. The case was *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*¹⁴

Bonito Boats designed a recreational boat hull, investing considerable time and expense,¹⁵ but that design was not protected by a patent.¹⁶ Boats that incorporated the hull sold well throughout Florida and elsewhere.¹⁷ Bonito’s competitor, Thunder Craft, copied Bonito’s hull by means of plug molding, and sold boats built on hulls derived from that copying.¹⁸ This allowed Thunder Craft to enjoy the competitive advantage of matching Bonito Boats’ technology without having to incur the same research and development expenses.¹⁹

Thunder Craft’s copying violated a Florida anti-molding statute that was specifically designed to protect boat hulls.²⁰ When Bonito Boats brought suit under that statute, the trial court found for Thunder Craft on the ground that the statute was void because it conflicted with the policies

¹¹ *Id.*

¹² *Id.* at 7.

¹³ See Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law and Administration, 1787–1836* (pt. 2), 80 J. PAT. & TRADE-MARK OFF. SOC’Y 11 (1998); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1 (1994); Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 365-68 (1992).

¹⁴ 489 U.S. 141 (1989).

¹⁵ *Id.* at 144.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 145.

¹⁹ *Id.*

²⁰ *Id.* at 144.

embodied in the federal Patent Act.²¹ The higher Florida courts affirmed.²²

The Supreme Court also affirmed, on the basis that federal patent law gave an inventor only “a limited opportunity to obtain a property right in an idea. Once an inventor has decided to lift the veil of secrecy from his work, he must choose the protection of a federal patent or the dedication of his idea to the public at large.”²³ Thus, the only choices available to an inventor were “‘secrecy or legal monopoly.’”²⁴ By openly selling boats equipped with the new hull without having obtained a patent on the hull, Bonito Boats effectively dedicated its hull design to the public domain.²⁵

The Court justified this apparently unfair outcome on the basis that “[t]he Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”²⁶ The Court stressed the limitations imposed upon Congress by that balance:

[T]he Clause contains both a grant of power and certain limitations upon the exercise of that power. Congress may not create patent monopolies of unlimited duration, nor may it “authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”²⁷

Thus, when an invention falls into the public domain, as by the expiration of a patent term, “‘the right to make the thing formerly covered by the patent becomes public property.’”²⁸ At that point, the public enjoys “‘the same right to make use of [the formerly patented invention] as if it had never been patented.’”²⁹

This is a necessary consequence of federal intellectual property policy; as the Court recognized, “imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”³⁰ Protecting the ability of the public to engage in productive imitation is an important aspect of federal policy:

²¹ *Id.* at 145.

²² *Id.* at 145-46.

²³ *Id.* at 149.

²⁴ *Id.* (quoting *Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co.*, 153 F.2d 516, 520 (2d Cir. 1946) (Hand, J.)).

²⁵ *Bonito Boats*, 489 U.S. at 149-151.

²⁶ *Id.* at 146.

²⁷ *Id.* (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)).

²⁸ *Id.* at 152 (quoting *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185 (1896)).

²⁹ *Id.* at 152 (quoting *Coats v. Merrick Thread Co.*, 149 U.S. 562, 572 (1893)).

³⁰ *Id.*

The [*Bonito Boats*] Court also recognized that in addition to providing the incentive for inventors to develop and share useful new ideas that will eventually enrich the public domain, the patent system serves the purposes of the Intellectual Property Clause by the protection it *denies*. The patent system protects inventors and the general public from depletion of the common store of knowledge by denying protection to inventions that are obvious or of limited novelty. “[T]he stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the use of the public.”³¹

In sum, the Court found that strong federal public policy required “allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”³² The Florida statute violated this policy by granting patent-like rights to a non-secret, unpatented invention.³³ In the words of the Court:

[T]he Florida statute allows petitioner to reassert a substantial property right in the idea, thereby constricting the spectrum of useful public knowledge. Moreover, it does so without the careful protections of high standards of innovation and limited monopoly contained in the federal scheme. We think it clear that such protection conflicts with the federal policy “that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent.”³⁴

Thus, the Court found that a state legislature could not pass legislation that conflicted with federal public policy, even though that legislation did not contravene any specific provision of federal law.

The critical point here is the dual nature of federal intellectual property policy: it seeks to serve the interests of authors and inventors on the one hand, and those of the public at large on the other. Granting exclusive rights in what would otherwise be public-domain information has the effect of benefiting the former at the expense of the latter.

The Court explicitly extended this view to the copyright context in 1991, when it rendered a 9–0 decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*³⁵ Rural Telephone Service Company, Inc. was a Kansas local telephone company that published a yearly telephone direc-

³¹ Graves, *supra* note 6, at 77 (quoting *Bonito Boats*, 489 U.S. at 150, in turn quoting *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979)).

³² *Bonito Boats*, 489 U.S. at 153 (quoting *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964)).

³³ *Id.* at 159–60.

³⁴ *Id.* (quoting *Lear, Inc. v. Adkins*, 395 U.S. 653, 668 (1969)).

³⁵ 499 U.S. 340 (1991).

tory.³⁶ Rural's competitor, Feist Publications, Inc., was in the business of publishing telephone directories that covered multiple telephone service areas.³⁷ While both companies provided their directories free of charge, they competed fiercely for the advertising revenues that their directories earned.³⁸

Rural assembled the information contained in its directory by taking the information provided by its telephone service customers and arranging the telephone numbers alphabetically by name.³⁹ Feist had no simple or cheap means of re-creating this information, so it offered to buy the information from Rural, which refused.⁴⁰ This had the effect of making Feist's regional directory less attractive to potential advertisers because of the gap in its regional coverage.⁴¹ Feist responded to Rural's refusal by copying the names and telephone numbers without paying for them.⁴² When Rural sued Feist for copyright infringement, Feist argued that it was entitled to copy the information because it was outside the scope of copyright protection.⁴³ The trial and appellate courts disagreed, finding for Rural.⁴⁴

The Supreme Court reversed on the basis of what it called "[t]he most fundamental axiom of copyright law," namely that "'no author may copyright his ideas or the facts he narrates.'" ⁴⁵ Because Rural's directory was a mere compendium of facts, whose assembly required no creativity or originality, the Court found that it was not subject to copyright protection:

The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. "Original," as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.⁴⁶

Because Rural's work lacked even that minimal originality, it was not subject to copyright protection, and Feist did no actionable wrong by copying from it.⁴⁷

³⁶ *Id.* at 342.

³⁷ *Id.*

³⁸ *Id.* at 342-43.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 343.

⁴² *Id.*

⁴³ *Id.* at 344.

⁴⁴ *Id.*

⁴⁵ *Id.* at 345 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

⁴⁶ *Id.* at 345 (citations omitted).

⁴⁷ *Id.* at 363-64.

Moreover, the Court made it plain that this was no question of statutory construction: it held originality to be a “constitutional requirement.”⁴⁸ This is because “facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”⁴⁹

Any such fact is automatically in the public domain, and thus freely available to copying by anyone.⁵⁰ Thus, the Court ruled that “[t]he originality requirement is constitutionally mandated for all works.”⁵¹ *Feist* makes it clear that “the Intellectual Property Clause does not empower Congress to grant exclusive rights to what the public already owns and freely uses, i.e., public domain knowledge and works.”⁵²

Thus, the Intellectual Property Clause provides Congress with only limited authority to grant exclusive rights to information and ideas. As the following section will demonstrate, that authority is increasingly inadequate to what Congress may well perceive as pressing needs for intellectual property protection, especially in the international arena.

III. THE DEMAND FOR ADDITIONAL INTELLECTUAL PROPERTY POWER AND POTENTIAL MEANS FOR MEETING THAT DEMAND

The past decade has seen an explosion in the volume of international trade.⁵³ The post-cold-war world has experienced a sharp increase in both the number of international commercial relationships, and the volume of international transactions.⁵⁴ This general increase in international trade has been matched, or even exceeded, by an increase in international intellectual property transactions.

Foreign sales of U.S. intellectual property are already valued in the ten-figure range, and they are steadily increasing, with comparable in-

⁴⁸ *Id.* at 346.

⁴⁹ *Id.* at 347.

⁵⁰ *Id.*

⁵¹ *Id.* at 347 (quoting L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 n.155 (1989)).

⁵² Graves, *supra* note 6, at 80.

⁵³ For general commentary on this phenomenon, see Ronald F. Lipp, *The Crisis in International Trade: Remarks at the 20th Annual McGeorge International Law Symposium*, 15 TRANSNAT'L LAW. 31 (2002).

⁵⁴ See John W. Head, *Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st-Century Economy*, 50 U. KAN. L. REV. 731 (2002).

creases in the value of foreign intellectual property used in the U.S.⁵⁵ U.S. accession to international intellectual property regimes has resulted, to some degree at least, in an internationalization of its approach to intellectual property protection.⁵⁶

This has resulted in pressure on the United States to conform its intellectual property protection to the practice of other parties, notably the European Union.⁵⁷ At the strong urging of the EU, the U.S. recently passed legislation to increase the term of its copyright protection to match that provided by EU law.⁵⁸ Congress undertook this harmonization of copyright terms largely for reasons of trade policy.⁵⁹

A further harmonization with European intellectual property protection, this one unequivocally inconsistent with the limitations of that Clause as interpreted by the Supreme Court, is in prospect. Under the European Union Database Directive,⁶⁰ copying of unoriginal information — the type addressed in *Feist* — is illegal.⁶¹ Thus, the EU has forbidden conduct that, according to the Supreme Court, Congress cannot forbid under the Intellectual Property Clause, though certain legislative efforts along those

⁵⁵ See Ryan Beard, *Reciprocity and Comity: Politically Manipulative Tools for Protection Of Intellectual Property Rights in the Global Economy*, 30 TEX. TECH L. REV. 155, 195 n.374 (1999).

⁵⁶ See Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929 (2002); Brent T. Yonehara, Comment, *Enter the Dragon: China's WTO Accession, Film Piracy, and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389 (2002); Joshua S. Bauchner, *Globalization and Democratization: The Reclaiming of Copyright*, 4 TUL. J. TECH. & INTELL. PROP. 93 (2002); Robert M. Sherwood, *Global Prospects for the Role of Intellectual Property in Technology Transfer*, 42 IDEA 27 (2002).

⁵⁷ See Lisa M. Brownlee, *Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 579 (1996); Jerome N. Epping, Jr., *Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing*, 65 U. CIN. L. REV. 183 (1996).

⁵⁸ See ROBERT L. BARD & LEWIS KURLANTZICK, *COPYRIGHT DURATION: DURATION, TERM EXTENSION, THE EUROPEAN UNION, AND THE MAKING OF COPYRIGHT POLICY* (1999).

⁵⁹ See Christina N. Gifford, Note, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 386-88 (2000).

⁶⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 Mar. 1996, on the Legal Protection of Databases, 1996 O.J. (L77).

⁶¹ Mark Powell, *The European Union's Database Directive: An International Antidote to the Side Effects of Feist?*, 20 FORDHAM INT'L L.J. 1215, 1221 (1997).

lines have already been attempted.⁶² More recent EU enactments will likely increase the pressure on Congress to redouble those efforts.⁶³

When Congress has run up against the limitations of the Intellectual Property Clause in the past, it has sought to circumvent them via the Commerce Clause.⁶⁴ Section IV, below, assesses whether it will succeed in doing so in the future. Given the increasing pressure on Congress to expand intellectual property protection, from both foreign and domestic interests,⁶⁵ it seems likely that, should the Commerce Clause prove unavailing, Congress will look to the next likely source for authority to legislate, namely the Treaty Power, which is addressed in section V, below.

There are at least three means by which Congress could use the Treaty Power to require adherence to foreign intellectual property norms in the U.S. First, it could simply legislate pursuant to intellectual property treaties to which the U.S. is already a party, of which there are many.⁶⁶ Such treaties typically specify minimum standards rather than maximum ones, and as the Berne Convention Implementation Act indicates,⁶⁷ Congress has claimed for itself the power to determine whether it has fulfilled the requirements of a treaty by implementing legislation.⁶⁸

Second, the federal government could enter into a treaty for the purpose of circumventing limitations on Congressional lawmaking authority. There is good reason to believe that the scope of the treaty enacted for this purpose would not be restricted to external matters. There is little current support for the once widely-held proposition that the proper sub-

⁶² See, e.g., Collections of Information Antipiracy Act, S. 2291, 105th Cong. § 2 (1998) (“Congress finds that . . . as a result of the decision of the United States Supreme Court in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), and certain decisions of the inferior courts of the United States, the copyright law affords members of the United States business community, both individuals and entities who create and distribute compilations of data, little or no protection against piracy.”).

⁶³ See, e.g., Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁶⁴ See, e.g., *The “Vessel Hull Design Protection Act”*: Hearings on H.R. 2696 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the Comm. on the Judiciary, 105th Cong. (1997).

⁶⁵ Peter A. Jaszi, *Goodbye to All That — A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595 (1996).

⁶⁶ See generally Gervais, *supra* note 56.

⁶⁷ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

⁶⁸ See Carlos J. Moorehead, *H.R. 2962, The Berne Convention Implementation Act of 1987*, 3 J.L. & TECH. 187 (1988).

ject-matter of a treaty is limited to matters of “international concern.”⁶⁹ Illustrative of this change is the abrupt shift between the Second and Third *Restatement of Foreign Relations*: according to the former, “[t]he United States has the power under the Constitution to make an international agreement if . . . the matter is of international concern,”⁷⁰ while the latter states that “the Constitution does not require that an international agreement deal only with ‘matters of international concern.’”⁷¹

Thus, the President could, either with the help of the Senate or via executive order, contract with a foreign government on matters that are purely domestic in intended scope of application. The treaty that would result would be valid, in the sense that it is unlikely in the extreme that courts would refuse to recognize it. The question would then become whether the treaty, though valid, was nonetheless insufficient to authorize legislation that Congress could not otherwise pass.

The third means of using the treaty power to make foreign intellectual property norms enforceable in the U.S. is the most complicated and indirect, but efforts that might achieve it are already under way. Those efforts may well lead to the accession by the federal government to a treaty that would require U.S. recognition of foreign judgments based on claims that would not be valid if initially brought in U.S. courts.⁷² By means of such a treaty, Congress might well seek to bring some degree of order and predictability to this situation by passing legislation requiring recognition of foreign judgments according to federal standards. This might resolve the minor problem of divergences in state law standards for recognition, and the perhaps more vexing one of whether federal or state policy should govern the “public policy” exception.⁷³

It would only do so, however, if Congress can achieve under the Commerce Clause or the Treaty Power what it cannot achieve via the Intellectual Property Clause. Thus, all three possible means by which Congress could seek to harmonize U.S. intellectual property law with foreign law on

⁶⁹ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 394 (1998).

⁷⁰ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 117(1) (1965).

⁷¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. c (1987).

⁷² See Felix D. Strebler, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT'L & COMP. L.J. 55, 66 (1999); Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 191 (2001).

⁷³ See generally Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111 (1998).

that subject will depend upon the inquiries addressed in the next three sections.

IV. THE LIMITS OF THE COMMERCE CLAUSE

Before 1995, the Supreme Court had not invalidated a statute for exceeding Congress's power under the Commerce Clause since 1936.⁷⁴ The Court ended that fifty-nine-year period of acquiescence in *United States v. Lopez*,⁷⁵ a case in which a bare majority of the Court held that Congress had no power under the Commerce Clause to enact the Gun-Free School Zones Act because the conduct at issue had insufficient connections with interstate commerce.⁷⁶ *Lopez* followed a series of cases in which the Court had hinted alternately that the Commerce Clause had certain limits,⁷⁷ and that those limits were enforceable only via political means rather than judicial ones.⁷⁸

The Supreme Court revisited the limits of the Commerce Clause in *United States v. Morrison*,⁷⁹ another 5–4 decision, but one that offered the broadest and clearest statement of the Court's interpretation of the Enumerated Powers Doctrine. In the words of the Court, “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. ‘The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.’”⁸⁰

In applying this generality to the Congressional enactment before it, namely the Violence Against Women Act, the Court noted that the limits of the commerce power were “inherent in ‘our dual system of govern-

⁷⁴ *Carter v. Carter Coal Co.*, 298 U.S. 238, 316 (1936).

⁷⁵ 514 U.S. 549 (1995).

⁷⁶ See 18 U.S.C. § 922(q) (1990); see also *United States v. Morrison*, 529 U.S. 598, 609 (2000) (“In *Lopez*, we held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress’ authority under the Commerce Clause.”) (citations omitted).

⁷⁷ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁷⁸ For background on these developments, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). The latter view, which had prevailed in the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*, is best summarized in a gloss on *Garcia* by Justice Brennan in which he opined that the limits imposed by federalism are “structural, not substantive — i.e., that States must find their protection from Congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.” *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

⁷⁹ 529 U.S. 598 (2000).

⁸⁰ *Id.* at 607 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

ment.’”⁸¹ It stated that the three broad categories of permissible legislation under those limits are:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.⁸²

The Court went on to draw a sharp distinction between these permissible areas of legislation and those that would “‘effectually obliterate the distinction between what is national and what is local.’”⁸³ If Congress could properly legislate against criminal acts, regardless of how remote the connection between those acts and interstate commerce, then, the Court observed, there could be no principled stopping-place between that legislation and laws passed on any subject at all:

Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.⁸⁴

As the Court formulated the issue, the question in *Morrison* was whether the Enumerated Powers Doctrine could be maintained at all. Congress’s findings in support of the Violence Against Women Act found connections between the conduct forbidden under the Act and economic productivity; in essence, Congress’s contention was that if victims of violence could be burdened in traveling or working, the effect of that burden on the national economy as a whole would suffice to empower it to pass legislation to prevent it.⁸⁵

The Court ruled that this was “a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s

⁸¹ *Id.* at 608 n.3 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

⁸² *Id.* at 609 (citations omitted).

⁸³ *Id.* at 608 n.3 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).

⁸⁴ *Id.* at 613.

⁸⁵ *Id.* at 615.

enumeration of powers.”⁸⁶ In fact, the Court found that, in light of the arguments advanced by the government in *Morrison*, “the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority seems well founded.”⁸⁷

The Court also rejected, quite specifically, the contention that the limits of the Commerce Clause were to be enforced by political rather than judicial mechanisms.⁸⁸ In the tart language of the *Morrison* majority opinion, the character of the Constitution as *written* organic law required the conclusion that “the limitation of congressional authority is not solely a matter of legislative grace.”⁸⁹ Moreover, the Court characterized that limitation specifically in terms of the separation of powers into federal and state spheres of authority:⁹⁰

[T]he Framers crafted the federal system of Government so that the people’s rights would be secured by the division of power. . . . Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution’s provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature’s self-restraint.⁹¹

In short, a judicially-enforced distinction between national and local subjects, and thus between federal and local authority, is required to prevent the concentration of all power in the central government.⁹²

⁸⁶ *Id.*; see also *Lopez*, 514 U.S. at 566 (“The Constitution . . . withhold[s] from Congress a plenary police power”); *Morrison*, 529 U.S. at 619 n.8 (“[T]he Constitution reserves the general police power to the States.”).

⁸⁷ *Morrison*, 529 U.S. at 615 (citations omitted); see also *id.* (“Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.”).

⁸⁸ *Id.* at 608 n.3.

⁸⁹ *Id.* at 616.

⁹⁰ See also *id.* at 616 n.7 (“[T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.”) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

⁹¹ *Id.*

⁹² *Id.* at 618.

The clearest test to date of the commerce power as it relates to the Copyright Clause occurred in the 1999 case *United States v. Moghadam*.⁹³ The defendant was convicted of an anti-bootlegging statute that Congress had passed in 1994⁹⁴ to implement the provisions of the Agreement on Trade Related Aspects of Intellectual Property (“TRIPs”).⁹⁵ The statute criminalized the sale of unauthorized recordings of live musical performances.⁹⁶ The defendant argued that Congress had no power to enact the statute, and the government responded that Congress had sufficient power to do so both under the Copyright Clause and under the Commerce Clause.⁹⁷

The defendant argued that, because a live performance was by definition “fleeting and evanescent,” it was not fixed or reduced to tangible form as required by both the Copyright Act and the “Writings” term of the Copyright Clause.⁹⁸ The court pretermitted this argument altogether:

Because we affirm the conviction in the instant case on the basis of an alternative source of Congressional power, we decline to decide in this case whether the fixation concept of Copyright Clause can be expanded so as to encompass live performances that are merely capable of being reduced to tangible form, but have not been. For purposes of this case, we assume *arguendo*, without deciding, that the above described problems with the fixation requirement would preclude the use of the Copyright Clause as a source of Congressional power for the anti-bootlegging statute.⁹⁹

The court appears to have made this choice at least in part to avoid another thorny issue, namely the constitutionality of apparently perpetual protection under the Copyright Clause.¹⁰⁰ Disappointingly, nothing in the opinion suggests that either party or the court considered whether Congress’s treaty power might have furnished a third arguable basis for upholding the legislation.

The court noted at the outset of its Commerce Clause discussion that, “[b]ecause Congress thought it was acting under the Copyright Clause, predictably there are no legislative findings in the record regarding the effect of bootlegging of live musical performances on interstate or foreign

⁹³ 175 F.3d 1269 (11th Cir. 1999).

⁹⁴ 18 U.S.C. § 2319A (2000).

⁹⁵ For background on this point, see David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1391-92 (1995).

⁹⁶ 18 U.S.C. § 2319A (2000).

⁹⁷ *Moghadam*, 175 F.3d at 1271.

⁹⁸ *Id.* at 1274.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1274 n.9.

commerce.”¹⁰¹ Even in the absence of such findings, the court had little difficulty in concluding that the statute regulated conduct that had a significant impact on interstate and international commerce:

The link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident If bootlegging is done for financial gain, it necessarily is intertwined with commerce. Bootleggers depress the legitimate markets because demand is satisfied through unauthorized channels . . . [and g]enerally speaking, performing artists who attract bootleggers are those who are sufficiently popular that their appeal crosses state or national lines.¹⁰²

The court gave short shrift to the limitations recently imposed on the Commerce Clause by the U.S. Supreme Court in *Lopez*:

[T]he type of conduct that Congress intended to regulate by passing the anti-bootlegging statute is by its very nature economic activity, which distinguishes the statute from the Gun-Free School Zones Act struck down in *Lopez*, which in criminalizing the possession of handguns within 1000 feet of a school, “ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1630-31. . . . We hold that the anti-bootlegging statute has a sufficient connection to interstate and foreign commerce to meet the *Lopez* test.¹⁰³

To its credit, however, the court did not stop there. It went on to address what it termed the “more difficult question” of whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause.”¹⁰⁴ In addressing that question, the court began with the premise that “each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another.”¹⁰⁵

The court’s most directly applicable example of this premise was its citation of the *Trade-Mark Cases*,¹⁰⁶ in which the Supreme Court struck down an early trademark statute enacted pursuant to the Copyright Clause, but later recognized that such a statute could properly be enacted

¹⁰¹ *Id.* at 1275.

¹⁰² *Id.* at 1276.

¹⁰³ *Id.* at 1276-77.

¹⁰⁴ *Id.* at 1277.

¹⁰⁵ *Id.*

¹⁰⁶ 100 U.S. 82 (1879).

pursuant to the Commerce Clause.¹⁰⁷ However, the court went on to identify fairly solid authority against the substitutability of the Commerce Power in the U.S. Supreme Court's 1982 decision, *Railway Labor Executives' Ass'n v. Gibbons*.¹⁰⁸

In *Gibbons*, the Court reviewed a statute by which Congress had intervened in a pending bankruptcy case, imposing on the debtor's estate the duty to pay millions of dollars to its former employees.¹⁰⁹ This was inconsistent with the Bankruptcy Clause, under which Congress has the power to enact only *uniform* bankruptcy laws.¹¹⁰

Despite the obvious and systematic impact upon interstate commerce of both bankruptcy law in general and the challenged law in particular, the Court refused to allow Congress to do under the Commerce Clause what it could not do under the Bankruptcy Clause. The Court reasoned that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."¹¹¹

The *Moghadam* court recognized the tension between *Gibbons* and the *Trade-Mark Cases*, and set out quite deliberately to resolve that tension.¹¹² It did so in favor of the government's Commerce Clause argument, reasoning that the fixation requirement of the Copyright Act was not constitutionally required. In the words of the court, "the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other Constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term 'Writings.'"¹¹³ The court justified that conclusion as follows:

The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term "Writings" operates as a ceiling on Congress' ability to legislate pursuant to other grants. Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection. Quite the contrary, extending such protection actually complements and is in harmony with the ex-

¹⁰⁷ *Moghadam*, 175 F.3d at 1279.

¹⁰⁸ 455 U.S. 457 (1982).

¹⁰⁹ *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982).

¹¹⁰ U.S. CONST. art. I, § 8, cl. 4.

¹¹¹ *Gibbons*, 455 U.S. at 468-69.

¹¹² *Moghadam*, 175 F.3d at 1280.

¹¹³ *Id.*

isting scheme that Congress has set up under the Copyright Clause.¹¹⁴

Despite the firm wording of this conclusion, the court expressed at least two very significant reservations to its theory of the substitutability of the Commerce Clause for the Copyright Clause. First, the court was careful to note that its holding was “limited to the fixation requirement, and should not be taken as authority that the other various limitations in the Copyright Clause can be avoided by reference to the Commerce Clause.”¹¹⁵ In so noting, the court made explicit reference to the originality requirement that the Supreme Court found in *Feist* to be Constitutionally mandated.¹¹⁶

Second, the court observed that the anti-bootlegging statute contained no duration limitation despite the caveat of the “limited Times” provision of the Copyright Clause: “On its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit; therefore phonorecords of live musical performances would presumably never fall into the public domain.”¹¹⁷ The court refused on technical grounds to address the thorny problems that this feature of the statute would pose:

[B]ecause Moghadam has not challenged the constitutionality of section 2319A on this basis, we decline to raise the issue sua sponte. Thus, we do not decide in this case whether extending copyright-like protection under the anti-bootlegging statute might be fundamentally inconsistent with the “Limited Times” requirement of the Copyright Clause, and we do not decide in this case whether the Commerce Clause can provide the source of Congressional power to sustain the application of the anti-bootlegging statute in some other case in which such an argument is preserved. We reserve those issues for another day.¹¹⁸

Despite the careful wording of the *Moghadam* opinion, the majority of scholars who have considered the issue have come to the conclusion that its central holding — that Congress can do under the Commerce Clause what it cannot do under the Copyright Clause — is incorrect.¹¹⁹

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1281 n.14.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1281.

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Theodore H. Davis, Jr., *Copying in the Shadow of the Constitution: The Rational Limits of Trade Dress Protection*, 80 MINN. L. REV. 595, 640 (1996) (“Congress cannot override constitutional limitations on its own authority merely by invoking the Commerce Clause.”); Rochelle C. Dreyfuss, *A Wiseguy’s Approach to Information Products: Muscling Copyright and*

Nonetheless, Congress is of the firm opinion that it can do via the Commerce Clause what it cannot do via the Intellectual Property Clause, as witness the Vessel Hull Design Protection Act,¹²⁰ a law that purports, at least in part, to overrule *Bonito Boats* legislatively.¹²¹ It is unlikely that the Supreme Court will be willing to acquiesce in such circumventions: as of this year, every sitting member of the U.S. Supreme Court has voted at least once to invalidate legislation on the grounds that Congress had exceeded the scope of its enumerated powers.¹²²

V. TREATY POWERS AND LEGISLATIVE AUTHORITY

The two poles that define the legal terrain of this article consist of the U.S. Supreme Court's majority opinion in the 1920 case *Missouri v. Hol-*

Patent into a Unitary Theory of Intellectual Property, 1992 SUP. CT. REV. 195, 230 ("Restrictions on constitutional grants of legislative power, such as the Copyright Clause, would be meaningless if Congress could evade them simply by announcing that it was acting under some broader authority."); Michael F. Finn, "Just the Facts, Ma'am": *The Effect of the Supreme Court's Decision in Feist Publications, Inc. v. Rural Telephone Service Co. on the Colorization of Black and White Films*, 33 SANTA CLARA L. REV. 859, 871 (1993) ("It seems likely that the same rationale present in *Gibbons* would also bar any type of Commerce Clause legislation aimed at removing limitations of the Intellectual Property Clause."); John J. Flynn, *The Orphan Drug Act: An Unconstitutional Exercise of the Patent Power*, 1992 UTAH L. REV. 389, 414 n.81 ("[T]he Commerce Clause and the Patent Clause should be read together as establishing an implicit policy of precluding the federal government from granting private parties unregulated and exclusive monopolies over economic activity other than that authorized by the Patent Clause."); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 361 (1999) ("When a specific clause of the Constitution, such as Clause 8 of Article I, Section 8, has been construed as containing general limitations on Congress's power, Congress may not avoid those limitations by legislating under another clause."); Malla Pollack, *The Right to Know?: Delineating Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 60 (1999) ("Congress may not do an end run around a limitation in one clause of the Constitution by invoking a more general clause.").

¹²⁰ Pub. L. No. 105-304, tit. V, 112 Stat. 2905 (1998) (codified at 17 U.S.C. § 1301, 1332 (2000)).

¹²¹ For background on the issues raised by this legislation, see Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002).

¹²² See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas); *Eldred v. Ashcroft*, 123 S.Ct. 769 (2003) (Justices Breyer and Stevens); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Justice Ginsburg); and *New York v. United States*, 488 U.S. 1041 (1992) (Justice Souter).

land,¹²³ and its plurality opinion in *Reid v. Covert*,¹²⁴ decided some thirty-seven years later. *Holland* concerned federal legislation designed to protect flocks of birds that periodically migrated across the U.S. border.¹²⁵ Earlier, courts had struck down that legislation as unconstitutional because it went beyond the enumerated powers of Congress.¹²⁶

The President and Senate sought to circumvent this problem by entering into a migratory birds treaty,¹²⁷ which they believed would empower Congress to pass legislation pursuant to the Supremacy Clause and the Necessary and Proper Clause.¹²⁸ According to the first Clause, the Constitution, its laws, and most importantly, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹²⁹

According to the second, Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹³⁰

Interestingly, Justice Holmes’s opinion did not characterize the issue before the Court as whether it was improper, as a matter of the structural imperatives of a federal system, for a treaty to grant Congress powers otherwise denied it. Instead, Justice Holmes turned the Enumerated Powers Doctrine neatly on its head by noting that “[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution.”¹³¹ That noted, he wrote, “[t]he only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”¹³²

This is a disingenuous phrasing of the question. The question was not whether the treaty was invalid; in fact, research has revealed no instance in which a treaty has ever been held invalid on grounds of intrusion on state

¹²³ 252 U.S. 416 (1920). For an in-depth treatment of the background of this case, see G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 64-75 (1999).

¹²⁴ 354 U.S. 1, 18 (1957).

¹²⁵ *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

¹²⁶ *United States v. McCullagh*, 221 F. 288, 290 (D. Kan. 1915) (Commerce Clause and the General Welfare Clause); *United States v. Shauver*, 214 F. 154, 156 (E.D. Ark. 1914) (Territory and Property power of Art. IV, § 3, cl. 2).

¹²⁷ See Act of March 4, 1913, ch. 145, 37 Stat. 847.

¹²⁸ U.S. CONST. art. VI, cl. 2.

¹²⁹ *Id.*

¹³⁰ U.S. CONST. art. I, § 8, cl. 18.

¹³¹ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹³² *Id.* at 433-34.

prerogatives.¹³³ Even before the end of the eighteenth century, it was well-established that when state law and federal treaty law conflicted, the treaty prevailed.¹³⁴ In the words of Justice Chase, written less than a decade after the ratification of the Constitution, “every treaty made, by the authority of the United States, [is] superior to the Constitution and laws of any individual State.”¹³⁵

A more apt phrasing of the question presented by *Holland* would have been whether, when the enumerated powers given Congress by the Constitution failed to empower Congress to achieve a certain end, an agreement with a foreign country could give Congress additional powers. The treaty was certainly valid; the question was whether it was also a well-spring of new power not contemplated by the Constitution. Phrased in that way, the question suggested a different answer from the one Justice Holmes reached: in the words of Thomas Jefferson, “surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way.”¹³⁶

It may be that Justice Holmes chose his phrasing of the question because of the urgent plight of the birds, which he characterized as involving “a national interest of very nearly the first magnitude,”¹³⁷ and one that could be served “only by national action in concert with that of another power.”¹³⁸ While he admitted that “[n]o doubt the great body of private relations usually fall within the control of the State,” he nonetheless insisted that a treaty “may override its power.”¹³⁹

The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit

¹³³ See Robert Anderson IV, “Ascertained in a Different Way”: *The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 GEO. WASH. U.L. REV. 189, 190 (2001) (“the Supreme Court has not invalidated a treaty on federalism grounds throughout the nation’s entire two hundred-plus year history.”); accord LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 185 (1996).

¹³⁴ See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (holding a Virginia law invalid because it was inconsistent with the peace treaty of 1783 between the U.S. and Britain).

¹³⁵ *Id.* at 237; accord *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817).

¹³⁶ Thomas Jefferson, *A Manual of Parliamentary Practice, in JEFFERSON’S PARLIAMENTARY WRITINGS* 421 (Wilbur Samuel Howell ed., 1988).

¹³⁷ *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

¹³⁸ *Id.*

¹³⁹ *Id.* at 434.

by while a food supply is cut off and the protectors of our forests and our crops are destroyed.¹⁴⁰

Another observer might have seen nothing in the Constitution that would permit the federal government to enter into an agreement with a foreign power for the purpose of increasing its own domestic power, regardless of the urgency of the problem.

Certainly an earlier Court might have had reservations about circumventing Congressional limitations in this manner; in 1890, the Court declared that “[i]t would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.”¹⁴¹ That same Court also noted, in language reminiscent of many opinions from the current Court’s recent federalism opinions, that the treaty power is not immune to limitations that “aris[e] from the nature of the government itself and of that of the States.”¹⁴² Even Justice Holmes added the qualification that “[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way,”¹⁴³ though he never specified what that “different way” might be.¹⁴⁴

But of course, here again is the ambiguity with respect to the “treaty-making power”; in reality, there is not one treaty power here: there are two closely related, but ultimately different treaty powers. The first is the power to enter into valid international agreements, binding upon the United States as a whole. The second is the power of Congress to pass legislation pursuant to a treaty, binding upon all governments and individuals within the United States, via the Necessary and Proper Clause and the Supremacy Clause. The true question Justice Holmes faced in *Holland* was whether the second treaty power could extend Congress’s power to legislate beyond the limits imposed by the Enumerated Powers Doctrine. That question remains very much open today.

For a brief period in the years following World War II, that question assumed great importance in the minds of federal legislators because of the enormous increase in the number and scope of treaties into which the United States was entering.¹⁴⁵ Their concern was sufficiently great to warrant considerable efforts to amend the Constitution to reverse the rule of *Holland*.¹⁴⁶ Principal among these was the Bricker Amendment,¹⁴⁷ which

¹⁴⁰ *Id.* at 435.

¹⁴¹ *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

¹⁴² *Id.*

¹⁴³ *Holland*, 252 U.S. at 433.

¹⁴⁴ See Anderson, *supra* note 133.

¹⁴⁵ Bradley, *supra* note 69, at 399.

¹⁴⁶ *Id.*

provided that “[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.”¹⁴⁸ In various forms, it passed the House, and came within one vote of securing approval in the Senate.¹⁴⁹

Over time, the concerns that had motivated the supporters of the Bricker Amendment became less acute. One reason for this was a 1957 Supreme Court decision that found that the power of Congress to legislate pursuant to treaties was actually subject to limits. Specifically, the Court answered the question whether a treaty could empower Congress to pass legislation that contravened another provision of the Constitution.

Reid v. Covert dealt with legislation, enacted pursuant to a foreign basing-rights treaty, under which the dependents of U.S. soldiers stationed overseas could be tried via court-martial for criminal offenses.¹⁵⁰ This had the effect of denying those dependents, inter alia, their Sixth Amendment jury trial right.¹⁵¹ Once again, counsel for the government argued that, taken together with the Supremacy Clause and the Necessary and Proper Clause, the applicable treaty provided Congress with all the legislative power it needed.¹⁵²

The Court disagreed. According to Justice Black’s plurality opinion, there is nothing in the Supremacy Clause “which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”¹⁵³ Justice Black declared that it would be “alien to our entire constitutional history and tradition” to allow the government to increase its legislative power in this way.¹⁵⁴ He characterized the contrary position as “permit[ting] amendment of th[e Constitution] in a manner not sanctioned by Article V.”¹⁵⁵

Article V of the Constitution is of course its amending provision, a device that Justice Black pronounced adequate to whatever needs confronted the government: “If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by

¹⁴⁷ For background on this subject, see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 345 (1995).

¹⁴⁸ S.J. Res. 1, 83d Cong., 99 Cong. Rec. 6777 (1953). There were actually numerous versions of the Bricker Amendment, but all sought essentially the same outcome. Bradley, *supra* note 69, at 426-27.

¹⁴⁹ 100 Cong. Rec. S2374-75 (1954).

¹⁵⁰ *Reid v. Covert*, 354 U.S. 1, 2-3 (1957).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 16.

¹⁵⁴ *Id.* at 17.

¹⁵⁵ *Id.*

the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.”¹⁵⁶

Justice Black went on to state that “[t]here is nothing in [*Missouri v. Holland*] which is contrary to the position taken here.”¹⁵⁷ He elaborated:

There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.¹⁵⁸

But this simply repeats *Holland’s* misstatement of the issue. *Reid* did not hold that the treaty at issue was invalid; it held that the treaty could not empower Congress to contravene the Sixth Amendment. The question that naturally arises from that holding is why the Sixth Amendment consisted of “prohibitory words” (in *Holland’s* phrasing) or qualifies as a “specific provision” of the Constitution (in *Reid’s*), when the Tenth Amendment did not. Neither opinion answers that question, or indeed even appears to recognize that it could be raised.

This suggests that both Justice Holmes and Justice Black understood the Tenth Amendment to be a mere truism, so much so that they did not feel the need to articulate this understanding, let alone defend it. In treaty-power cases, the lower courts have followed *Reid*, and have not yet assessed the impact of recent developments in Tenth Amendment jurisprudence on the status of that provision as being “specific” and “prohibitory” rather than dead-letter.¹⁵⁹

Despite the passage of nearly a half century, the Supreme Court has not revisited this issue.¹⁶⁰ Thus, “we can now say with confidence that the

¹⁵⁶ *Id.* at 14.

¹⁵⁷ *Id.* at 18.

¹⁵⁸ *Reid v. Covert*, 354 U.S. 1, 18 (1957). This statement is difficult to square with the canon of construction announced in *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938), under which “[e]ven the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them.”

¹⁵⁹ See, e.g., *United States v. Lue*, 134 F.3d 79, 85 (2d Cir. 1998); accord *Palila v. Hawaii Dep’t of Land & Natural Resources*, 471 F. Supp. 985, 993 (D. Hawaii 1979), *aff’d*, 639 F.2d 495 (9th Cir. 1981) (upholding federal bird management regulations due to the Migratory and Endangered Bird Treaty with Japan, which the Endangered Species Act specifically referenced).

¹⁶⁰ Bradley, *supra* note 69, at 425-26; Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1731 (1998).

Treaty Power, at least in the domain of individual rights — the setting of *Reid v. Covert* — is subject to the Constitution's other limitations. The proper scope of the Treaty Power with respect to the states and the coordinate branches of government, however, is still unsettled.”¹⁶¹

Another reason for the dissolution of the impetus for the Bricker Amendment was the enormous growth of federal legislative authority derived from other sources. Throughout the post-World War II period, the Supreme Court steadily expanded its jurisprudence regarding the Commerce Clause, the Necessary and Proper Clause, and the Fourteenth Amendment¹⁶² — so much so that, until recently, Congress had nearly unlimited power to legislate without resort to the Treaty Power.¹⁶³

As of the Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁶⁴ it appeared that the Court regarded the Tenth Amendment and the Enumerated Powers Doctrine as all but dead letter.¹⁶⁵ By 1988, the Supreme Court had “so broadened the scope of Congress' constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power.”¹⁶⁶

Recent, sharp changes in this jurisprudence have cut back significantly on Congressional power under the Commerce Clause, reinvigorated the Tenth Amendment, and given rise to a view of retained state sovereignty or “vertical separation of powers” under which Congress may well have to look to the treaty power as a source for legislative authority.

A suggestion of this need came about in the 2001 case *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,¹⁶⁷ in which the Supreme Court was once again called upon to hold forth on matters concerning migratory birds. This time, the question was whether the Clean Water Act empowered the United States Army Corps of Engineers to assert federal authority “over an abandoned sand and gravel pit” in northern Illinois in which those birds sought refuge.¹⁶⁸

An issue raised by that case, but one that the Court was able to avoid, was whether the Commerce Clause provided sufficient warrant for the

¹⁶¹ Anderson, *supra* note 133, at 192.

¹⁶² See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-58 (1964); *Katzenbach v. Morgan*, 384 U.S. 641, 651-58 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-44 (1968).

¹⁶³ Healy, *supra* note 160, at 1733.

¹⁶⁴ 469 U.S. 528 (1985).

¹⁶⁵ Yoo, *supra* note 78, at 1311; Bradley, *supra* note 69, at 399.

¹⁶⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 227 (2d ed. 1988).

¹⁶⁷ 531 U.S. 159, 162 (2001).

¹⁶⁸ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 162 (2001).

Clean Water Act.¹⁶⁹ The Court's reasoning suggested, however, that if the Act was sustainable via the Commerce Clause on the facts before it, it was only barely so.¹⁷⁰ In the future, if the Court should be confronted with that issue more unavoidably, it might well be required to decide whether applicable migratory-bird treaties could justify the Act. The Court has already suggested that the Commerce Clause might well not — at least where wholly-intrastate, seasonal bird puddles are concerned.¹⁷¹

The most recent judicial gloss on this problem suggests what may well be a new trend in resolving the *Holland/Reid* conundrum, however. In *Romeu v. Cohen*,¹⁷² a 2001 case that arose out of the contested U.S. presidential election of 2000, the Second Circuit addressed the plaintiff's claim that the Uniformed and Overseas Citizens Absentee Voting Act,¹⁷³ as applied, had denied him his right to vote in that election.¹⁷⁴

In a concurring opinion, Chief Judge Walker wrote to state his disagreement with dicta in the majority opinion that suggested that Congress had the power to permit U.S. citizens residing in Puerto Rico or other territories to cast votes for U.S. presidential candidates.¹⁷⁵ In the course of making his disagreement clear, Judge Walker addressed the question whether Congress could enact legislation to that effect for the purpose of implementing the "universal and equal suffrage" requirement of Article 25 of the International Covenant on Civil and Political Rights:¹⁷⁶

I believe the answer is plainly "no." While the scope of Congress's authority under the Treaty Clause is separate and independent of its other enumerated powers, see, e.g., *Missouri v. Holland*, 252 U.S. 416, 433-34, 40 S.Ct. 382, 64 L.Ed. 641 (1920) (Holmes, J.), it (like Congress's spending power) cannot be used to alter the structural relationships enshrined in the Constitution . . . *Reid v. Covert*, 354 U.S. 1, 16-17, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1956) (plurality opinion).¹⁷⁷

This view is not easily supportable in terms of the *Reid* opinion: after all, *Reid* did not purport to address per se the "structural relationships" among the branches of the federal government, or between the federal government and the state governments.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 173-74.

¹⁷² 265 F.3d 118 (2d. Cir. 2001).

¹⁷³ 42 U.S.C. §§ 1973ff-1, 1973ff-6 (2000).

¹⁷⁴ *Romeu v. Cohen*, 265 F.3d 118, 120 (2d. Cir. 2001).

¹⁷⁵ *Id.* at 131.

¹⁷⁶ 6 I.L.M. 368 (1967).

¹⁷⁷ *Romeu*, 265 F.3d at 135 n.8 (emphasis added).

Unless Judge Walker's citation of *Reid* is an oblique reference to the plurality's insistence that Congress could not legislate de facto amendments to the Constitution, that citation is, at best, only a beginning. It is worthy of note, however, that elsewhere in his opinion he cites *Lopez*,¹⁷⁸ *Morrison*,¹⁷⁹ *New York v. United States*,¹⁸⁰ and *Printz*,¹⁸¹ all of which are discussed below, and all of which may have considerable relevance to the continuing vitality of the rule of *Holland* and *Reid*.¹⁸²

The remainder of this article will address whether that rule has survived the recent tectonic shift in the Supreme Court's view of the separation of powers between the federal government and the states.

VI. STRUCTURAL IMPEDIMENTS TO TREATY-BASED EXPANSION OF FEDERAL LEGISLATIVE POWER

As we approach the half-century mark of the rule of *Reid*, the most striking feature of the legal landscape is how recent many of its pertinent features are. The doctrines that bear most directly upon the vertical separation of powers issues relevant to the rule of *Reid* have seen their most dramatic developments over the course of little more than the past decade. Subsections B, C, and D address these doctrines in detail.

As a threshold matter, however, the relevance of these doctrines must be established. For a time, the Supreme Court operated on a theory according to which the federal government possessed extraconstitutional powers in matters touching upon foreign affairs. If this were true, doctrines based on Constitutional provisions that purported to limit federal power might well be irrelevant to the subject-matter of this article. Thus, subsection A addresses the short history of the theory of extraconstitutional foreign-affairs power in the jurisprudence of the Supreme Court.

A. *The Applicability of the Enumerated Powers Doctrine in Foreign Affairs*

Any issue involving treaty powers necessarily involves interactions between the United States and other countries, and it is in this arena that the need for the union to speak with one voice is at its most acute. The Articles of Confederation limited the treaty power to Congress, and specifically forbade any such power to the states.¹⁸³ The Articles were silent, however, with respect to what force treaties would have with respect to

¹⁷⁸ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁷⁹ *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁸⁰ 505 U.S. 144 (1992).

¹⁸¹ *Printz v. United States*, 521 U.S. 898 (1997).

¹⁸² *Romeu*, 265 F.3d 118.

¹⁸³ Articles of Confederation arts. VI, IX (1777).

inconsistent state law.¹⁸⁴ As a consequence, “state noncompliance with national treaty obligations undermined the national government’s ability to bargain effectively with foreign nations.”¹⁸⁵

Writing in the *Federalist Papers*, John Jay argued that “just causes of war” arose largely from the violation of treaties, and that such violations were “less to be apprehended under one general government than under several lesser ones.”¹⁸⁶ To remedy this perceived deficiency in the Articles of Confederation, the Constitution not only contained a treaty provision, under which “[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ;”¹⁸⁷ it also put treaties beyond the power of the states to thwart: “All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”¹⁸⁸

In the words of James Madison, “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”¹⁸⁹ Toward this end, the Constitution also grants many foreign-affairs powers to the federal government, and specifically denies others to the states.¹⁹⁰ This is consistent with the Framers’ determination to limit the ability of the states to interfere with the pursuit of a single, uniform approach to foreign affairs.¹⁹¹

The jurisprudence of the Supreme Court has only confirmed and solidified federal supremacy regarding international relations.¹⁹² The question that remains is whether the foreign-affairs primacy of the federal government can give rise to a grant of legislative power to Congress that is unlimited by the vertical separation of powers concerns inherent in federalism.¹⁹³

¹⁸⁴ Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1102 (1992); Healy, *supra* note 160, at 1728.

¹⁸⁵ Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1643-44 (1997).

¹⁸⁶ THE FEDERALIST NO. 3 (John Jay).

¹⁸⁷ U.S. CONST. art. II, § 2, cl. 2.

¹⁸⁸ *Id.* art. VI, cl. 2.

¹⁸⁹ THE FEDERALIST NO. 42 (James Madison); *see also* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840) (“Every part of [the Constitution] shows, that our whole foreign intercourse was intended to be committed to the hands of the general government: and nothing shows it more strongly than the treaty-making power . . .”).

¹⁹⁰ *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3; art. I, § 8, cl. 4; art. I, § 8, cl. 5; art. I, § 8, cl. 10; art. I, § 8, cl. 11; art. I, § 8, cls. 12 – 13; art. I, § 10, cl. 1; art. I, § 10, cl. 2; art. I, § 10, cl. 3; art. II, § 2, cl. 2; art. II, § 2, cls 2–3.

¹⁹¹ Healy, *supra* note 160, at 1749-50.

¹⁹² White, *supra* note 123, at 9.

¹⁹³ *Id.* at 25.

The relevant issue is therefore not whether Congress or the states should have the foreign-affairs power; clearly the federal government has it, and clearly the states should not have it. The issue is whether the power to execute treaties should carry with it, under the Necessary and Proper and Supremacy Clauses, the power to pass legislation, binding domestically, that would otherwise be beyond Congress's power altogether.

As early as 1890, the Court had glossed on limitations inherent in the treaty power: "It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."¹⁹⁴

However, only sixteen years after *Missouri v. Holland*, the Court suggested that it was abandoning such limitations, and the Enumerated Powers Doctrine along with it: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper . . . is categorically true only in respect of our internal affairs."¹⁹⁵

The Court based this claim on the historically bizarre notion that, pursuant to the Treaty of Paris, by which Great Britain recognized the independence of the United States, the foreign-affairs sovereignty of the colonies, formerly held by Great Britain, fell "not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."¹⁹⁶

Under this reasoning, the Declaration of Independence was without legal effect, despite Great Britain's ratification of the claimed independence in the Treaty of Paris. Even more oddly, if the United States (or the colonies) held no foreign-affairs power before the execution of that treaty, then it (or they) necessarily had no power to enter into that treaty at all.

Most relevant to the topic of this article, however, is the inconsistency between this broad claim of power and the outcome of *Reid v. Covert*. If the federal foreign-affairs power is unconstrained by the Constitution, it is difficult to see why the "prohibitory language" limitation of *Holland* is necessary, and equally difficult to see how that foreign-affairs power could have been unable to prevail over the Sixth Amendment.

Despite the shortcomings of the reasoning of *Curtiss-Wright*, the Court later went on to extend the rule of that case, which was in essence "a broad theory of inherent plenary power . . . ultimately rooted in the executive branch,"¹⁹⁷ to new areas of application in 1937¹⁹⁸ and 1942.¹⁹⁹

¹⁹⁴ *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

¹⁹⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936).

¹⁹⁶ *Id.*

¹⁹⁷ Lee Ann Askew, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1128, 1132 (1999).

In 1952, however, the Court retreated from its position on extraconstitutional executive powers in *Youngstown Sheet & Tube Co. v. Sawyer*.²⁰⁰

That case dealt with the President's response to a widespread strike in the steel industry that took place during the Korean War.²⁰¹ His response took the form of the seizure of most of the nation's steel mills, an act that he ordered on his own authority, without Congressional authorization.²⁰²

The Court rejected any notion that extraconstitutional presidential powers could justify this action, ruling that "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."²⁰³ Because Congress had not acted, and because the President's Constitutional power as Commander-in-Chief did not extend from the battlefields in Korea all the way to the steel mills of the homeland, the seizure was invalid.²⁰⁴

Treaties entered into by the President and the Senate — or even just the President²⁰⁵ — are, generally, part of the "supreme Law of the land," at least if they are self-executing.²⁰⁶ This has led many scholars to conclude that "our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations."²⁰⁷

As *Youngstown Sheet & Tube* demonstrates, however, the Enumerated Powers Doctrine continues to function, to some degree at least, in the realm of federal foreign-affairs power.²⁰⁸ And as the other sections of this article demonstrate, the Enumerated Powers Doctrine has been resoundingly reaffirmed and extended in recent Supreme Court jurisprudence. So the question remains open whether the federal government can use the treaty power to grant itself new and unenumerated powers, and legislate

¹⁹⁸ *United States v. Belmont*, 301 U.S. 324, 331 (1937).

¹⁹⁹ *United States v. Pink*, 315 U.S. 203, 230 (1942). For general discussions of *Belmont* and *Pink*, see Askew, *supra* note 197.

²⁰⁰ 343 U.S. 579, 585 (1952).

²⁰¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

²⁰² *Id.*

²⁰³ *Id.* at 585.

²⁰⁴ *Id.*

²⁰⁵ Bradley, *supra* note 69, at 391-92.

²⁰⁶ See generally Vazquez, *supra* note 184.

²⁰⁷ Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530 (1991); accord Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 34, 46-47 (1997); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmts. c-d (1987).

²⁰⁸ Bradley, *supra* note 69, at 392.

pursuant to those powers in a manner that binds both states and individuals.²⁰⁹

B. The Tenth Amendment and Vertical Separation of Powers

The beginnings of an answer to that question can be found in *New York v. United States*,²¹⁰ a Supreme Court case that concerned challenges to the Low-Level Radioactive Waste Policy Act of 1980²¹¹ as modified by certain amendments in 1985.²¹² Among the new provisions enacted in 1985 was the requirement that each state either regulate its radioactive-waste output in a manner approved of by the federal government, or take title to the waste and, with that title, full responsibility for the waste's disposal.²¹³ The primary objection to the new provisions was that they were inconsistent with the Enumerated Powers Doctrine and with the Tenth Amendment.²¹⁴ The Court treated those two issues as if they were in fact one:

In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."²¹⁵

The Court also recognized a limit on federal power suggested by the Tenth Amendment, but "not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology."²¹⁶ The Court suggested that the non-tautological purpose or aspect of the Tenth Amendment was to serve as a reminder "to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power."²¹⁷

Under this view of what might be characterized as a penumbra of the Tenth Amendment, "it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power

²⁰⁹ *Id.* at 394.

²¹⁰ 505 U.S. 144 (1992).

²¹¹ Pub. L. No. 96-573, 94 Stat. 3347.

²¹² *New York v. United States*, 505 U.S. at 150-51.

²¹³ *Id.* at 174-75.

²¹⁴ *Id.* at 156.

²¹⁵ *Id.* (quoting *United States v. Darby*, 312 U.S. 100 (1941)).

²¹⁶ *Id.* at 156-57.

²¹⁷ *Id.*

delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.”²¹⁸

Thus, the Court was slowed not at all in its inquiry by the conclusion that Congress had full power to regulate the disposal of nuclear waste under the Commerce Clause.²¹⁹ Nor was it taken aback by the conclusion that, “under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation.”²²⁰ The question still remained whether Congress had “impermissibly directed the States to regulate in this field.”²²¹ According to the Court, that was a question on which the slate before it was largely blank.²²²

The guiding principle by which the Court went on to fill in that blank was the preservation of the political independence of the state governments: “[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”²²³

One feature of the “indestructible union” was the Framers’ explicit choice of a system in which both the federal and state governments would act independently on individuals, but neither would act directly upon the other:²²⁴ “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States . . . even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”²²⁵

The Court found that two of the three new features of the radioactive waste act were consistent with this systemic imperative. The first of these was a series of sticks and carrots that the Court described as follows:

First, Congress has authorized States with disposal sites to impose a surcharge on radioactive waste received from other States. Second, the Secretary of Energy collects a portion of this surcharge and places the money in an escrow account. Third,

²¹⁸ *Id.* at 159.

²¹⁹ *Id.* at 159-60.

²²⁰ *Id.* at 160.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 162 (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)).

²²⁴ *Id.* at 165.

²²⁵ *Id.* at 166.

States achieving a series of milestones receive portions of this fund.²²⁶

Because Congress had the power under the Commerce Clause both to impose charges on transactions like these, and to impose conditions on its disbursement of funds received via those charges, none of these measures was improper.²²⁷

The second new feature granted states and regional compacts that operated disposal sites the power “gradually to increase the cost of access to the sites, and then to deny access altogether, to radioactive waste generated in States that do not meet federal deadlines.”²²⁸ Once again, this was well within Congress’s commerce power “to authorize the States to discriminate against interstate commerce.”²²⁹ Thus, like the first new feature, the second did not “intrude on the sovereignty reserved to the States by the Tenth Amendment.”²³⁰

The Court found, however, that the third new feature, the take-title provision, “crossed the line distinguishing encouragement from coercion.”²³¹ That provision forced states to choose between two options, neither one of which Congress had the power to enact alone.²³² The first option could take one of two forms, each of which was unacceptable. A forced transfer of radioactive waste to state-government ownership would in essence be a “congressionally compelled subsidy from state governments to radioactive waste producers,” one for which there was no Constitutional warrant.²³³

Likewise, holding states liable for waste generators’ damages would be “indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents.”²³⁴ Either of these outcomes would “‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”²³⁵

The second option boiled down to “a simple command to state governments to implement legislation enacted by Congress,” which the Court emphatically denied that Congress had the power to do.²³⁶ Accordingly,

²²⁶ *Id.* at 171.

²²⁷ *Id.* at 171-73.

²²⁸ *Id.* at 173.

²²⁹ *Id.* at 174.

²³⁰ *Id.*

²³¹ *Id.* at 175.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 176.

because Congress had no power to enact either requirement standing alone, “it follows that Congress lacks the power to offer the States a choice between the two.”²³⁷

Once again, the Court was rather vague regarding what specific provision of the Constitution was offended by Congress’s imposition of this choice upon the states: “Whether one views the take title provision as lying outside Congress’ enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.”²³⁸ It was also rather vague with respect to the role, if any, played by the relative strength of the federal interest at stake in the legislation.

The opinion admits, without illuminating elaboration, that the strength of the relevant federal interest can factor into the Tenth Amendment equation,²³⁹ but declares that “whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable *federal* regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact *state* regulation.”²⁴⁰ In sum, the Court concluded that “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”²⁴¹

The Court reached this decision not out of any concern for the state governments per se, but rather to preserve the bifurcated nature of the U.S. governmental system as a whole:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”²⁴²

This diffusion of power is, in effect, a vertical separation of powers, in which a concentration of power in one level of government is to be

²³⁷ *Id.* at 175-76.

²³⁸ *Id.* at 176.

²³⁹ *Id.* at 177.

²⁴⁰ *Id.* at 177-78 (emphases in original).

²⁴¹ *Id.* at 178.

²⁴² *Id.* at 179 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

avoided by preserving the power inherent in the other: “Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”²⁴³

The Court seemed particularly concerned with what might be termed a “tyranny of good intentions,” under which the balance of power within the federal government, or between the federal and state level of governance, is abandoned in the face of a perceived, pressing need: “[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”²⁴⁴

The Court emphatically reaffirmed this emphasis upon the vertical separation of powers in *Printz v. United States*.²⁴⁵ That case involved a challenge to the Brady Handgun Violence Prevention Act,²⁴⁶ which Congress had enacted in 1993.²⁴⁷ The Act imposed on the Attorney General the duty to establish a nationwide system for instant background checks on purchasers of handguns.²⁴⁸ Under the Act, the “chief law enforcement officer” of the locality in which the gun was purchased was required to discharge certain duties with respect to those background checks.²⁴⁹ In the words of Justice Scalia’s opinion:

[T]he Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make “reasonable efforts” within five days to determine whether the sales reflected in the forms are lawful.²⁵⁰

Certain state law-enforcement officers objected to “being pressed into federal service, and contend[ed] that congressional action compelling state officers to execute federal laws [was] unconstitutional.”²⁵¹ According to

²⁴³ *Id.* at 181 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

²⁴⁴ *Id.* at 187.

²⁴⁵ 521 U.S. 898, 903 (1997).

²⁴⁶ Pub. L. No. 103-159, 107 Stat. 1536.

²⁴⁷ *Printz v. United States*, 521 U.S. 898, 903 (1997).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 904.

²⁵¹ *Id.* at 905.

Justice Scalia's opinion, the question presented by this claim was one of first impression, and was thus one to be decided by reference to "historical understanding and practice," "the structure of the Constitution," and the "jurisprudence of the Court."²⁵²

On the first point, the Court identified instances going back to 1789 in which Congress had, by both action and inaction, strongly suggested that Congress did not believe that it had the power to command state officers directly.²⁵³ The Court also made reference to the *Federalist Papers*, which it characterized as being among the "sources we have usually regarded as indicative of the original understanding of the Constitution."²⁵⁴ According to that work, as quoted in the Court's opinion:

"[T]he laws of the [federal government] as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws."²⁵⁵

The Court interpreted this language to mean "nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law"²⁵⁶ This interpretation, of course, left open the question whether the federal government could properly commandeer the personnel of state governments, and the Court summarized its historical inquiry as being inconclusive.²⁵⁷

The Court then turned to the structure of the Constitution, to determine whether what it termed that document's "essential postulates"²⁵⁸ would reveal a principle that would resolve the issue before it.²⁵⁹ The first of these postulates was what the Court termed the "incontestable" observation that the Constitutional system was one of "dual sovereignty," in

²⁵² *Id.*

²⁵³ *Id.* at 909-10.

²⁵⁴ *Id.* at 911.

²⁵⁵ *Id.* at 911-12 (quoting THE FEDERALIST NO. 27, at 177 (Alexander Hamilton)) (emphases in original).

²⁵⁶ *Id.* at 913.

²⁵⁷ *Id.* at 918.

²⁵⁸ The Court borrowed this term from *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

²⁵⁹ *Printz*, 521 U.S. at 918.

which the states retained a “residuary and inviolable sovereignty.”²⁶⁰ This was implicit in “the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, which implication was rendered express by the Tenth Amendment[].”²⁶¹

From this, the Court drew the implication that the federal government was not “a central government that would act upon and through the States,”²⁶² but rather “a system in which the State and Federal Governments would exercise concurrent authority over the people — who were, in Hamilton’s words, “the only proper objects of government.”²⁶³ The Court therefore concluded, as it had in *New York v. United States*, that “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”²⁶⁴

The Court characterized this choice on the part of the Framers as being warranted by the same caution as the separation of powers among the three branches of the federal government: “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”²⁶⁵

Justice Scalia’s view on the federal-state division as a vertical separation of powers rested on James Madison’s conception of the Constitutional system as one of multiple redundant safeguards against the concentration of power:

“[T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”²⁶⁶

The Court found that if the federal government possessed the power to commandeer state officials to carry out its policies, this power would create an imbalance in the vertical separation of powers between those two levels of government.²⁶⁷ Less immediately obvious, however, is the Court’s insistence that such a power would create an imbalance in the sep-

²⁶⁰ *Id.* at 918-19 (citations omitted).

²⁶¹ *Id.* (citations omitted).

²⁶² *Id.* at 919.

²⁶³ *Id.* at 919-20 (quoting THE FEDERALIST No. 15 (Alexander Hamilton), at 109).

²⁶⁴ *Id.* (citing *New York v. United States*, 505 U.S. at 166).

²⁶⁵ *Id.* at 921 (quoting 501 U.S. at 458).

²⁶⁶ *Id.* at 919-20 (quoting THE FEDERALIST No. 51 (James Madison), at 323).

²⁶⁷ *Id.* at 921.

aration of powers within the federal government itself.²⁶⁸ In Justice Scalia's view, such a power would enable Congress to bypass the executive branch of the federal government in achieving its ends:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove).²⁶⁹

Thus, according to the Court, "th[e] unity [of the federal executive] would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."²⁷⁰

The Court then turned to an argument raised by the dissent, one similar to the treaty-powers argument that Justice Holmes had regarded as dispositive nearly eight decades earlier in *Missouri v. Holland*. As the Court characterized it, the dissent claimed that, due to the operation of the Commerce Clause in conjunction with the Necessary and Proper Clause, "the Tenth Amendment imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers "*not* delegated to the United States."²⁷¹

The Court rejected this argument in such sweeping language as to call into serious question the reasoning of *Missouri v. Holland*. In its view, no law promulgated pursuant to the Commerce Clause could be "proper" within the meaning of the Necessary and Proper Clause if it "violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier" ²⁷² Such a law is, "in the words of *The Federalist*, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."²⁷³

²⁶⁸ *Id.* at 922.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 923.

²⁷¹ *Id.* (emphases in original).

²⁷² *Id.* at 924.

²⁷³ *Id.* (quoting THE FEDERALIST NO. 33, at 204 (Alexander Hamilton)).

The Court went on to note that this “principle of state sovereignty” was inherent not only in the Tenth Amendment, but also, explicitly or implicitly, in many others, as well as in the structure of the Constitution as a whole.²⁷⁴ On the strength of this argument, the Court also rejected the dissent’s claim that Article VI of the Constitution could justify federal legislative commandeering of state officials.²⁷⁵

According to that claim, because “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution,”²⁷⁶ state officers were bound to follow and implement laws enacted by Congress.²⁷⁷ Again, the Court dismissed this argument on the basis that any law enacted in derogation of Constitutionally-preserved state sovereignty was not a “Law[] of the United States . . . made in Pursuance [of the Constitution]”²⁷⁸ as required by Article VI.²⁷⁹ Laid out in this manner, the Supremacy Clause “merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.”²⁸⁰

The Court thus broadened the rule of *New York v. United States*, under which it had held that Congress was prohibited from compelling states to enact a federal regulatory scheme:

Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.²⁸¹

As the following subsections will show, this emphasis on vertical separation of powers will have a significant impact upon the continuing vitality of the rule of *Holland* and *Reid*.

²⁷⁴ *Id.* at 924 n.13.

²⁷⁵ *Id.*

²⁷⁶ U.S. CONST. art. VI.

²⁷⁷ *Printz*, 521 U.S. at 924 n.13.

²⁷⁸ U.S. CONST. art. VI, cl. 2.

²⁷⁹ *Printz*, 521 U.S. at 924 n.13.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 935.

C. *The Eleventh Amendment and the Preservation of Distinct State Sovereignty*

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”²⁸² Ever since *Hans v. Louisiana* over a century ago,²⁸³ the Court has interpreted this language to establish two essential principles: “first, that each State is a sovereign entity in our federal system; and second, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”²⁸⁴

Thus, the Court has maintained that “federal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’”²⁸⁵ Two cases involving recent attempts by Congress to circumvent this limitation on its power provide useful insight into the views of the current Court regarding the relationship between the federal government and the states.

*Seminole Tribe of Florida v. Florida*²⁸⁶ concerned a challenge to the Indian Gaming Regulatory Act, which conditioned tribe gaming privileges on the conclusion of a qualifying compact between the tribe and the relevant state government.²⁸⁷ The Act required state governments to negotiate with tribes in good faith to arrive at a compact,²⁸⁸ and empowered tribes to sue states in federal court to compel states to do so.²⁸⁹

The Court ruled that even though Congress had passed the Act pursuant to the Commerce Clause, and even though Congress had made clear its intent “to abrogate the States’ sovereign immunity” with respect to the Act,²⁹⁰ Congress lacked the power to achieve this,²⁹¹ even though “[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.”²⁹² This comparison was warranted by the observation that, while the states retained some authority over interstate trade,

²⁸² U.S. CONST. amend. XI.

²⁸³ 134 U.S. 1 (1890).

²⁸⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans*, 134 U.S. at 13).

²⁸⁵ *Id.* (quoting *Hans*, 134 U.S. at 15).

²⁸⁶ 517 U.S. 44 (1996).

²⁸⁷ Pub. L. No. 100-497, 102 Stat. 2475 (codified at 25 U.S.C. § 2710(d)(1)(C) (2000)).

²⁸⁸ 25 U.S.C. § 2710(d)(3)(A) (2000).

²⁸⁹ *Id.* § 2710(d)(7).

²⁹⁰ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

²⁹¹ *Id.*

²⁹² *Id.* at 62.

they “have been divested of virtually all authority over Indian commerce and Indian tribes.”²⁹³

Thus, “[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”²⁹⁴ In so doing, the Court made it clear that, like the Tenth Amendment, the Eleventh Amendment “reflects broader principles of state sovereignty than are expressed in [its] text”²⁹⁵ This is a necessary consequence of the Constitution’s “specifically recogniz[ing] the States as sovereign entities.”²⁹⁶

The Court has never limited its interpretation of the Eleventh Amendment to its literal language; instead, it has taken that Amendment to stand for a view of state governments as subordinate, but still sovereign within their own spheres of authority.²⁹⁷ In an even more recent Eleventh Amendment case, *Alden v. Maine*,²⁹⁸ the Court took this premise even farther, ruling that even in state courts, states are not subject to suit on federal statutory claims.²⁹⁹

In *Alden*, probation officers sued the State of Maine in state court under the Fair Labor Standards Act of 1938,³⁰⁰ claiming that the state had violated the Act’s overtime requirements.³⁰¹ The Court noted that *Seminole Tribe* had “made it clear that Congress lacks power under Article I to abrogate the States’ sovereign immunity from suits commenced or prosecuted in the federal courts.”³⁰² Extending that same rule, the Court held that Congress had no Article I power to subject non-consenting states to suit in state courts.³⁰³ It did so pursuant to reasoning that was extremely broad in scope:

The phrase [“Eleventh Amendment immunity”] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, its history, and the authoritative interpretations

²⁹³ *Id.*

²⁹⁴ *Id.* at 72.

²⁹⁵ Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 117 (2000).

²⁹⁶ *Seminole Tribe*, 517 U.S. at 71 n.15.

²⁹⁷ *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also id.* (“[T]he States entered the federal system with their sovereignty intact”).

²⁹⁸ 527 U.S. 706 (1999).

²⁹⁹ *See* Bradley, *supra* note 295, at 117.

³⁰⁰ 52 Stat. 1060, as amended, 29 U.S.C. § 201 et seq. (2000).

³⁰¹ *Alden*, 527 U.S. at 712.

³⁰² *Id.*

³⁰³ *Id.*

by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States).³⁰⁴

Thus, the Court found the authority for this sweeping recognition of state sovereignty, and immunity attendant upon sovereign status, in the structure of the Constitution itself, rather than in the language of any one of its specific provisions. Under the Constitution, the states "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."³⁰⁵

It made reference to the Enumerated Powers Doctrine,³⁰⁶ and to specific roles reserved to the states by various Constitutional provisions.³⁰⁷ Its most emphatic invocation, however, was of the Eleventh Amendment's immediate predecessor: "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."³⁰⁸

Thus, the federal structure of the union can, without specific textual support in any one Constitutional provision, trump Congress's legislative power under Article I, and can do so by "a power, accessible to and enforceable by the judiciary, that inheres in the system of federalism established by the Constitution."³⁰⁹

The Court found that this was in keeping with the Framers' intention that the states would "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."³¹⁰

The Court was clear in stating that Congress's enumerated powers did not permit Congressional encroachment upon the role of the states: "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."³¹¹

³⁰⁴ *Id.* at 713.

³⁰⁵ *Id.* at 715.

³⁰⁶ *Id.* at 713.

³⁰⁷ Specifically, it referred to Art. I, § 8; Art. II, §§ 2–3; and Art. III, § 2. *Alden*, 527 U.S. at 713.

³⁰⁸ *Alden*, 527 U.S. at 713–14.

³⁰⁹ *Id.* at 730.

³¹⁰ *Id.* at 714 (quoting THE FEDERALIST NO. 39 (James Madison)).

³¹¹ *Id.* at 748.

The Court apprehended that a Congressional power to subject states to suit would sharply diminish that status: “[A]n unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney’s fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design.”³¹² Thus, in the view of the Court, the power to sue (or rather, to authorize suits) is apparently the power, if not to destroy, then certainly to diminish — and such diminution is Constitutionally impermissible.

In *Alden*, the Court relied heavily on *Printz* for its narrow interpretation of the Supremacy and Necessary and Proper Clauses. Pursuant to *Printz*, the *Alden* Court held that only Congressional actions that are undertaken pursuant to a properly limited view of Congressional power become the supreme law of the land; invasions of the proper state sphere are, by contrast, nullities.³¹³ Likewise, the *Alden* opinion followed *Printz* in its assertion that a Congressional enactment that was repugnant to the retained sovereignty of the states was not “proper” within the means of the Necessary and Proper Clause, but was instead, in the language of the *Federalist Papers*, null and void as a “usurpation.”³¹⁴

This apparently holds true even when the Treaty Power is implicated. In the 1934 case *Principality of Monaco v. Mississippi*,³¹⁵ the Court recognized that no foreign country could sue a state without that state’s consent.³¹⁶ In the 1998 case, *Breard v. Greene*,³¹⁷ the Court reaffirmed that principle *per curiam* in a high-profile international case.³¹⁸

Breard was scheduled for execution in Virginia for a 1992 rape-murder.³¹⁹ He sought a stay of execution on the basis that he was a Paraguayan national, and had been denied his rights afforded him as a national of a party to the Vienna Convention on Consular Relations.³²⁰ Paraguay had taken up Breard’s case with the International Court of Justice, and obtained a provisional-measures order (relief similar to a prelimi-

³¹² *Id.* at 750.

³¹³ *Id.* at 731.

³¹⁴ *Id.* at 732-33.

³¹⁵ 292 U.S. 313 (1934).

³¹⁶ *Id.* at 329-30.

³¹⁷ 523 U.S. 371 (1998).

³¹⁸ For background on this case and the issues within it that are most relevant to this article, see Carlos Manuel Vasquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999).

³¹⁹ *Breard v. Greene*, 523 U.S. 371, 373 (1998).

³²⁰ Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

nary injunction) against his execution before that Court could hear the merits of the case.³²¹

Based in part on the Eleventh Amendment immunity of the State of Virginia, the U.S. Supreme Court refused to order a stay of execution for Breard: “If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.”³²² This outcome suggests that the Treaty Power cannot, by itself at least, overcome the Eleventh Amendment,³²³ as many scholars suggest, under *Missouri v. Holland*, it should have.³²⁴ However, because *Breard* did not involve legislation enacted pursuant to a Treaty that specifically allowed the type of action brought by Breard, this case cannot definitively resolve this question. More telling on that point is the observation that when Congress approved the Eleventh Amendment, it specifically decided against incorporating into it an exception for treaty-based claims.³²⁵

Thus, the Eleventh Amendment cases provide further support for the proposition that, even in the foreign-affairs context, federalism understood as vertical separation of powers is a factor that may well restrain Congress’s power to legislate pursuant to treaty.

D. The Seventeenth Amendment and the Demise of Political Protection of Federalism

Two quotations from James Madison’s writings in the *Federalist Papers* serve to frame the issue that remains. In the first, he identified the threat that the Constitution was designed to prevent: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”³²⁶

In the second, he specified the principle by which such a concentration would be prevented: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first en-

³²¹ Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. (Apr. 9, 1998), 37 I.L.M. 810, 819 (1998).

³²² *Breard*, 523 U.S. at 377.

³²³ Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 118 (2000).

³²⁴ See, e.g., Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679 (1998); Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT’L L. 683 (1998).

³²⁵ *Alden v. Maine*, 527 U.S. 706, 725 (1999).

³²⁶ THE FEDERALIST No. 47 (James Madison).

able the government to control the governed; and in the next place oblige it to control itself.”³²⁷ The Framers sought to achieve this “by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”³²⁸

The Framers were keenly aware of the “insufficiency of a mere parchment delineation of the boundaries” between the powers of various governmental offices.³²⁹ Thus, the means of implementing this principle were to be political, rather than purely structural: by dividing the powers of government into separate spheres, each capable of thwarting the actions of the others, natural human ambition would cause those appointed to hold governmental powers to jealously guard their own powers, and thus prevent the concentration of those powers in a central body.³³⁰

This scheme applied not only to the separation of federal powers among the federal branches of government, but also to the separation of governmental power as a whole between the federal and state levels of governance.³³¹ The officials of the state governments could be counted upon, in effectuating their self-interest, to resist federal encroachments whenever they could, thereby counteracting federal ambition with state ambition: “The existence of subordinate governments, to which the people are attached . . . forms a barrier against the enterprises of ambition.”³³²

Thus, the answer of the Framers to the problem of concentration was conflict: power divided both horizontally and vertically, and jealously guarded by officeholders whose *vices*, including egocentrism and overweening ambition, could be trusted to motivate them to perform their Constitutional role of maintaining the diffusion of power throughout the Republic.³³³ In Madison’s words, the structure of the Constitution made use of human self-interest to “supply[], by opposite and rival interests, the

³²⁷ THE FEDERALIST No. 51 (James Madison).

³²⁸ *Id.*

³²⁹ THE FEDERALIST No. 73 (Alexander Hamilton).

³³⁰ Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47 (2002).

³³¹ Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1516 (1994).

³³² THE FEDERALIST No. 46 (James Madison).

³³³ Martin A. Feigenbaum, *The Preservation of Individual Liberty Through Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immorality*, 37 EMORY L.J. 613, 614 (1988); see also Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1088 (1988) (“Unwilling to separate authority, those who drafted the Constitution hoped for — and guaranteed — political conflict by creating ‘large degrees of jurisdictional overlap.’ Conflict was to be resolved not by recourse to the judiciary, but by recourse to the self-interest connected to each office.”).

defect of better motives.”³³⁴ In short, the Framers deliberately courted what we would today call “gridlock”:³³⁵

The proposed Constitution . . . is . . . neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.³³⁶

Part of this engineered gridlock was embodied in the means by which Senators were originally chosen. That means was arrived at quite consciously, and after vigorous debate; “the framers at Philadelphia debated longer and more intensely about [the Senate] than any other federal institution.”³³⁷ The original text provided that “[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislatures thereof.”³³⁸

The purpose of indirect election was to ensure that the states would not eventually be reduced to the status of mere provinces or satellites of the central government, with the result that the latter’s power would be all but unlimited.³³⁹ Madison’s reasoning was that because the Senate would be elected “absolutely and exclusively by the State Legislatures,”³⁴⁰ it would “owe its existence more or less to the favor of the State Governments.”³⁴¹ It would therefore have an institutional orientation toward the state legislatures that would be “much more likely to beget a disposition too obsequious, than too overbearing towards them,”³⁴² and would be “disinclined to invade the rights of the individual States, or the prerogatives of their governments.”³⁴³

³³⁴ THE FEDERALIST NO. 51 (James Madison).

³³⁵ See, e.g., THE FEDERALIST NO. 48 (James Madison) (“[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”).

³³⁶ THE FEDERALIST NO. 39 (James Madison).

³³⁷ Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1112 (1988).

³³⁸ U.S. CONST. art. I, § 3, cl. 1.

³³⁹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 454 (1833).

³⁴⁰ THE FEDERALIST NO. 45 (James Madison).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ THE FEDERALIST NO. 46 (James Madison).

Similarly, Alexander Hamilton argued in the New York ratification convention that if Senators “are ambitious to continue in office, they will make every prudent arrangement for this purpose, and, whatever may be their private sentiments or politics, they will be convinced that the surest means of obtaining a reelection will be a uniform attachment to the interests of their several states.”³⁴⁴ In his view, this was not merely desirable, but necessary. He argued that the departure from democratic principles inherent in the indirect election of Senators:

[C]ould not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the National Government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the [federal] principle; and would certainly have deprived the State governments of that absolute safe-guard, which they will enjoy under this provision.³⁴⁵

The debates on the ratification of the Constitution make clear that this was not only the theory of the architects of the Constitution; it was crucial to the willingness of the states to enter into the Constitution at all.³⁴⁶ Without both indirect election of Senators and the Bill of Rights, including the Tenth Amendment, it is unlikely in the extreme that the Constitution could ever have been ratified.³⁴⁷

In 1913, with the adoption of the Seventeenth Amendment, the Senate came to be composed of “two Senators from each State, elected by the people thereof”³⁴⁸ This change effectively dismantled the effect of the Senate as an institution that would represent “the states *as states*.”³⁴⁹ That Amendment removed the political incentive for Senators to protect

³⁴⁴ Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 679 (1999).

³⁴⁵ THE FEDERALIST NO. 59 (Alexander Hamilton).

³⁴⁶ Rossum, *supra* note 344, at 677.

³⁴⁷ For an extensive discussion of the means by which the states were persuaded to ratify the Constitution, see ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997).

³⁴⁸ U.S. CONST. amend. XVII.

³⁴⁹ Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 176-79 (1997) (emphasis added); see also THE FEDERALIST NO. 59 (Alexander Hamilton) (observing that the election of Senators by state legislatures secured “a place in the organization of the National Government” for the “States, in their political capacities.”).

the interests of the states as states,³⁵⁰ as opposed to protecting the interests of the state electorate (if that).³⁵¹ It did little to cure the evil it was intended to combat, namely corrupt, unresponsive Senators;³⁵² the composition and character of the Senate actually changed very little after ratification.³⁵³

What did change was the incentive structure within which the Senators operated. The Seventeenth Amendment had the effect of rendering the Tenth Amendment and other safeguards of federalism “mere parchment”: rules enforceable, if at all, by judicial rather than political means. In the nine decades since the passage of the Seventeenth Amendment, Senators have shown ever-decreasing allegiance to the prerogatives and political independence of the state governments, and have shown vanishingly little deference to the wishes of state legislatures.³⁵⁴

Thus, the recent federalism jurisprudence of the Supreme Court can best be understood as a series of attempts “to fill the gap created by the ratification of the Seventeenth Amendment . . . ,”³⁵⁵ because the political disincentives to federal expansion at the expense of the states have all but collapsed.³⁵⁶

Consequently, Justice Brennan’s 1988 gloss on federalism was sixty-five years out of date: He claimed that the limits imposed by federalism were “structural, not substantive — i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”³⁵⁷

³⁵⁰ See Roger G. Brooks, Comment, Garcia, *the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J. L. & PUB. POL’Y 189, 193 (1987).

³⁵¹ See Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1331-32 (1994).

³⁵² Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1360, 1402 (1996).

³⁵³ *Id.*

³⁵⁴ See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 16 (1988).

³⁵⁵ Rossum, *supra* note 344, at 673.

³⁵⁶ Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 770 (1996). For various viewpoints on the question of the interrelationship of the Seventeenth Amendment and the recent history of federalism, see Amar, *supra* note 352; Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 547 (1997); Todd J. Zywicki, *Senators and Special Interest: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994); Christopher H. Hoebeker, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* (1995); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629-31 (1991).

³⁵⁷ *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

Absent the political structures that had been designed to align incentives in such a way as to reinforce federalism through the political process,³⁵⁸ federalism could be saved, if at all, only by judicial efforts.³⁵⁹

Recent judicial efforts, consisting mainly of Supreme Court opinions endorsed by slim majorities, have been quite specific in their determination to preserve federalism by judicial means rather than by allowing the political process to work matters out in its own way. These efforts have been based quite explicitly on an understanding of the Framers' intent that "the people's rights would be secured by the division of power."³⁶⁰ To preserve that division of power, narrow majorities of the Court have sought "to prevent the accumulation of excessive power" in any one branch of the federal government, or in the federal government vis-a-vis the states.³⁶¹

What remains to be seen is whether this determination on the part of the Court will extend into the realm of the foreign-affairs power of the federal government as expressed in the Treaty Clause, under which the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur,"³⁶² coupled with the Supremacy Clause as it relates to treaties.³⁶³

Both the number of treaties to which the United States is a party, and particularly the scope of those treaties, have sharply increased in recent decades:

[T]here has been proliferation of treaties, such that treaty-making has now eclipsed custom as the primary mode of international law-making. Moreover, many of these treaties take the form of detailed multilateral instruments negotiated and drafted at international conferences. These treaties resemble and are designed to operate as international "legislation" binding on much of the world.³⁶⁴

³⁵⁸ For a description of some of these, see Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

³⁵⁹ See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1261 (1996); accord Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1325 (2001) ("decisions under the Commerce Clause serve only to police the outer boundaries of federal power — boundaries that have proven difficult to draw and enforce."). For the contrary view, see Kramer, *supra* note 358.

³⁶⁰ *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

³⁶¹ *Printz v. United States*, 521 U.S. 898, 921 (1997).

³⁶² U.S. CONST. art. II, § 2, cl. 2.

³⁶³ U.S. CONST. art. VI, cl. 2.

³⁶⁴ Bradley, *supra* note 69, at 396.

The list of treaties that impose requirements with respect to domestic U.S. law (or would impose them, if ratified) is extensive.³⁶⁵ Admittedly, a residual concern for federalism still exists in the Senate,³⁶⁶ and that concern has caused the Senate to refuse ratification of some treaties, and to insist upon the imposition of reservations upon others.³⁶⁷

Despite the Senate's reluctance to abandon federalism altogether in its treaty-ratifying role, two traditional preserves of state authority, namely domestic³⁶⁸ and criminal law,³⁶⁹ have been the subject of extensive internationalization,³⁷⁰ and some aspects of federal criminal law enacted pursuant to treaty³⁷¹ have been upheld by the lower courts against federalism-based challenges.³⁷² Moreover, many ratified treaties impose

³⁶⁵ See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, S. EXEC. REP. NO. 103-38 (1994), 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

³⁶⁶ Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 422 (1989). For extensive background on this point, see Natalie H. Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (1990); cf. George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463, 466-67 (1998); Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216 (1995); Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1453-60 (1994).

³⁶⁷ Askew, *supra* note 197, at 1130-31.

³⁶⁸ See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-94 (1890); accord Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821-25 (1995); Bradley, *supra* note 69, at 402.

³⁶⁹ See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'") (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

³⁷⁰ See Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625 (1997); Bradley, *supra* note 69, at 402; Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 36-37.

³⁷¹ See, e.g., the federal hostage statute, 18 U.S.C. § 1203 (2000).

³⁷² *United States v. Lue*, 134 F.3d 79 (2d Cir. 1998); *United States v. Lin*, 101 F.3d 760, 765-66 (D.C. Cir. 1996); *United States v. Lopez-Flores*, 63 F.3d 1468, 1470 (9th Cir. 1995).

requirements that have led some scholars to argue that Congress may legislate pursuant to those treaties in areas that would otherwise be off-limits to it.³⁷³

Similarly, the question arises whether Congress can circumvent restrictions like those recognized in *Bonito Boats* and *Feist* simply by enacting laws pursuant to already-enacted treaties (or new ones), or by enacting federal legislation governing the recognition of foreign judgments that would have much the same effect. Certainly, if treaties can give Congress additional legislative power, the intellectual property field is one in which such power would not be difficult to find,³⁷⁴ because that field is increasingly covered by treaty obligations.³⁷⁵

The suggestion has been raised that Congress can easily circumvent *Feist*, for example, using the treaty power, under *Missouri v. Holland*.³⁷⁶ This suggestion is ultimately untenable in light of the current federalism jurisprudence of the Supreme Court, however. The defining characteristics of that jurisprudence might be said to be a determination to preserve vertical separation of powers, and an equal determination to guard against what might be termed legislative “moral hazard.”

The latter term usually refers to the perverse incentive that an insured has with respect to some property that is worth more destroyed and collected upon than it is worth safe and secure.³⁷⁷ The Framers were, and the current Court is, deeply concerned with a similar concept: the personal advantage enjoyed by officeholders when they expand the power of their own offices.

As Madison put it, “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”³⁷⁸ He viewed the situation of the legislature similarly:

³⁷³ See, e.g., Neuman, *supra* note 207, at 49-53 (contending that Congress could resurrect the Religious Freedom Reconciliation Act as an implementation of the International Covenant on Civil and Political Rights); cf. Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT’L L. 659, 674 (1997).

³⁷⁴ See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 422 n.302 (1997).

³⁷⁵ Bradley, *supra* note 69, at 408; Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 546-49 (1997).

³⁷⁶ Michael B. Gerdes, Comment, *Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1465-68 (1992); cf. Gavin R. Villareal, Note, *One Leg to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez*, 76 TEXAS L. REV. 1125 (1998).

³⁷⁷ See BLACK’S LAW DICTIONARY 723 (Bryan Garner ed., 7th ed. 1999).

³⁷⁸ THE FEDERALIST NO. 10 (James Madison).

With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?³⁷⁹

For this reason, Congress is not allowed to be the judge of the extent of its own powers; permitting it to do so would leave both the other federal branches and the states at the mercy of “the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power”³⁸⁰ The situation is little improved if the ability to increase Congress’s power extraconstitutionally lies with the President and two-thirds of a directly-elected Senate. The Senate is just as much (or as little) limited by the Enumerated Powers Doctrine as is the House of Representatives, and the veto power gives the President considerable leverage in shaping legislation.³⁸¹

Thus, both the Senate and the President have a clear interest in increasing their own powers via the expansion of the legislative competence of Congress as a whole. If Congress’s enumerated powers are unavailing to achieve a strongly-desired end, a broad interpretation of *Missouri v. Holland* would allow the President and Congress to slip the tiresome bonds of gridlock:

[T]reaty-makers need only conclude a vague, generalized principle of treaty intent, and the Necessary and Proper Clause would empower Congress to engage in virtually unlimited lawmaking activities under that treaty. As a result, the President and Senate, if they have a legislative agenda beyond the legislative powers of Congress, could bind the United States by treaty merely to federalize a field of legislation. These incentives encourage the President and Senate to “sell” national sovereignty, both of the federal government and the states, to accomplish a shift of power to the federal level.³⁸²

Moreover, as the Supreme Court recognized in *New York v. United States*, it may well be that the state governments themselves do not always have an incentive to oppose federalization of certain areas of endeavor:

³⁷⁹ *Id.*

³⁸⁰ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

³⁸¹ See Charles Black, *Some Thoughts on the Veto*, 40 *LAW & CONTEMP. PROBS.* 95-97 (1976).

³⁸² Anderson, *supra* note 133, at 233.

Indeed, the facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location.³⁸³

Thus, the interests of public officials “may not coincide with the Constitution’s intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.”³⁸⁴ This suggests that the Court is willing to preserve the vertical separation of powers inherent in federalism even when *no* party in *any* part of the U.S. political spectrum has a political interest in defending it.

Ironically, Madison initially opposed the grant of the treaty-ratification power to the Senate, on the grounds that the indirectly-elected Senators would necessarily represent state interests rather than those of the United States as a whole.³⁸⁵ However, he held this view against the backdrop of widely-shared expectations that would decouple treaties from the preservation of federalism: “The framers of the American Constitution did not anticipate or desire the conclusion of many treaties.”³⁸⁶

More than two centuries later, “many treaties” have indeed been concluded. But it can be argued that, with respect to protection under the Intellectual Property Clause (i.e., copyright, patent, and a few related doctrines), the states have nothing to lose. Certainly it is true that federal legislation has occupied this field, leaving essentially nothing to the states.³⁸⁷

It is also irrelevant. What is essential is not whether the states suffer an absolute loss of power, jurisdiction, or responsibility, but rather whether they suffer *relative* reduction, i.e., whether federal power grows while state power does not. In *Printz*, the Supreme Court made a similar point with respect to horizontal separation of powers: “the power of the

³⁸³ *New York v. United States*, 505 U.S. 144, 182 (1992).

³⁸⁴ *Id.* at 183.

³⁸⁵ See Arthur Bestor, “Advice” from the Very Beginning, “Consent” When the End Is Achieved, 83 AM. J. INT’L L. 718, 719, 723 (1989); Healy, *supra* note 160, at 1728.

³⁸⁶ Quincy Wright, *The Constitutionality of Treaties*, 13 AM. J. INT’L L. 242, 242 (1919).

³⁸⁷ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.”³⁸⁸

Thus, the relevant question is whether Congress’s expansion of its own legislative power is permissible even when that expansion occurs in an area of law that is entirely federalized, and does not come at the expense of another branch of the federal government, or of the state level of governance as a whole. If this were permissible, then the broad scope of modern treaty commitments would render the Enumerated Powers Doctrine, the Tenth Amendment, and much of federalism dead letters. In fact, the result would be an exact inversion of the Enumerated Powers Doctrine: Congress would possess authority to pass any legislation it pleased, so long as that legislation did not violate some “prohibitory language” of similar stature to the Sixth Amendment.

This would have the result of permitting the perpetual aggrandizement of federal power, and a resulting perpetual diminution of state power (in relative or perhaps even absolute terms). In the view of James Madison, or for that matter of Justice Scalia and the current pro-federalism majority of the Supreme Court, this would be an intolerable outcome.

Thus, in all likelihood, the current Supreme Court will not support the broad interpretation of *Missouri v. Holland* even where the case for treaty-based legislative power is strongest, i.e., where Congress passes legislation pursuant to a treaty executed by the President and ratified by the Senate concerning subject-matter that is completely foreclosed to the states.

VII. CONCLUSION

This article has sought to determine whether the U.S. Supreme Court, as currently constituted, would countenance the use by Congress of its treaty powers to pass legislation that would otherwise be beyond its enumerated powers. The results of the recent Senate elections make it likely that the ideological makeup of the Court will not change markedly for years. Thus, the answer to this question is one that may well hold true throughout the second decade of the post-Cold-War era.

The significance of that answer is considerable. Trade is increasingly international; also increasingly, much trade is instantaneous, in the form of purchases of intangible, digitized property via electronic funds transfer. The vulnerability and high value of such property will ensure that powerful new interests, both in the U.S. and abroad, will join powerful older interests in persuasive calls for additional intellectual property protection.

³⁸⁸ *Printz v. United States*, 521 U.S. 898, 922-23 (1997).

Such protection will likely strain against the limitations of the Intellectual Property and Commerce Clauses. It is therefore likely that the Supreme Court will have to resolve the question of the continuing vitality of the *Holland/Reid* inversion of the Enumerated Powers Doctrine. And it is also likely that, absent an ideological shift not in immediate prospect, the Court will resolve that question in favor of the Enumerated Powers Doctrine.

This is a Court that has specifically and repeatedly echoed the words of James Madison and other Framers, men who were terrified of the centralization of governmental power, and who were determined to create structures to prevent it, even at the cost of government that would be perpetually conflicted, and frequently paralyzed. It is a Court that has found intolerable comparatively minor impositions upon the states based on the reasoning that such impositions, if multiplied, could reduce the states to mere provinces.

It is also a Court that has jealously guarded the residual sovereignty and “dignity” of the states as a bulwark against the self-aggrandizing tendencies of the federal government as a whole. Moreover, although it has not raised this point specifically, it is a Court that is well aware that the essential political safeguard of the states-as-states was dismantled by the Seventeenth Amendment, leaving only the judiciary to police the parchment boundaries beyond which the federal government should not go.

Thus, because the *Holland/Reid* rule would in essence make the federal government (i.e., the President and possibly two-thirds of the Senate) the judge of its own legislative power, this Court is highly unlikely to endorse that rule, regardless of whether Congress seeks to legislate directly pursuant to treaties, or to force the states to recognize foreign judgments at its direction.

There are at least three mechanisms, of increasing assertiveness, by which the Court could limit the moral hazard threatened by the *Holland/Reid* rule. The first would be to deny Congress power to legislate pursuant to a treaty provision that was not of “foreign concern” as that term was used in the meaning of the second foreign policy *Restatement* (though it was later deleted from the third). The second would be to examine each piece of treaty-based legislation individually for impermissible intrusion upon state prerogatives, in the mode of *New York v. United States*, *Printz*, *Seminole Tribe*, and *Alden*. The third would be to declare, echoing Justice Black, that Article Five of the Constitution exists for a reason, and that if Congress desires additional legislative power, it should make the case to the citizenry and the government (including the states) that such power is necessary.

The jurisprudence in this area does not admit of firmer conclusions, but this much seems likely: unless it reverses itself on first principles to

which it has adhered staunchly to date, the current majority of the Supreme Court is likely either to impose limitations upon the *Holland/Reid* rule when given an opportunity to do so, or to overrule it outright in the service of the parchment boundary between the federal and state spheres.